

FEB 24 2016 Case Number: SWF006720

Shawn Khalifa G02628

C.M.C. East, P.O. Box 8101, San Luis Obispo CA. 93409

January 21, 2016

Honorable Judge  
Judith Clark  
Riverside County Hall of Justice  
4100 Main Street  
Riverside CA. 92501

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SUPERIOR COURT OF CALIFORNIA  
COUNTY OF RIVERSIDE

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SUPERIOR COURT OF CALIFORNIA  
COUNTY OF RIVERSIDE

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Honorable Judge Judith Clark,

My name is Shawn Khalifa. I was convicted of 1st degree murder based on the Felony Murder Rule and sentenced to 25 years to life. This packet's intent is in hopes that you may request to the Governor that I should receive a commutation of sentence, or that you may recall my sentence and re-sentence me to a lessor Term.

At the time of my sentencing you gave me hope by acknowledging the positive course I had chosen after incarceration. I had served 3-years in Juvenile Hall, and almost 1-year in the County Jail at the time of my sentencing. I have since gone on to serve 8-more years in C.D.C.R. prisons. I have served 12-years of my 25 to life sentence. My positive accomplishments with new positive public support is included for your review.

Since receiving my sentence on December 21, 2007 there have been two rulings by the U.S. Supreme Court, *Graham V. Florida* (2010), and *Miller V. Alabama* (2012), that reinforce the differences between a Juvenile defendant versus an Adult. It is true I struggled at an early point in my life and incarceration so young has lead me to form a non-criminal lifestyle. I believe my character is formed to a point where I will get to spend the rest of my life void of a criminal mentality, and also trying to make up for the selfish youth I was.

Due to Senate Bill 9 my codefendant who was sentenced to two life without the possibility of parole sentences plus a 25-year to life enhancement, will have the ability to petition this court for a reduction of sentence after only serving 15-years of his Term. I have no such remedy because I was sentenced to a lessor Term. I have to serve a full 25-years before I have an opportunity to earn a release.

I accept incarceration as a proper punishment for my actions, but I do not believe a 25-year to life punishment is Just. I know I will be an asset to society when released, and I also believe a reduction of sentence would serve a better purpose for punishment and rehabilitation. Thank You for any time you may take in reviewing this packet.

signature

Case Number: SWF006720

Information in support for commutation of sentence

- Copy of Application to Governor

- Rulings and Support

- Psychologist Tasha Arneson

- Sentencing Judge Judith C. Clark

- Ninth Circuit Judge Pregerson

- Attorney James W. Whitehouse

- Supporter Marissa C. Presly

- Petition and Supporters

- 128B Laudatory Chrono

- Inmate Assignment History

- Education/Work Supervisor's Reports

- Certificates

- Legal Status Summery Sheet



Governor Edmund G. Brown Jr. · State Capitol · Sacramento, California 95814

### APPLICATION FOR COMMUTATION OF SENTENCE

Complete this application to request a commutation of sentence from the Governor. A commutation is a reduction or elimination of a sentence. If granted, this application will become a public record, however specific personal information will be redacted (hidden) before it is made available to the public.

#### APPLICANT INFORMATION

Name: Shawn Malone Khalifa Date of Birth: 11/16/88 Inmate ID: G-02628

Address: P.O. Box 8101, San Luis Obispo CA 93409 Facility: California Mens Colony

#### 1. Conviction Summary:

List all prior convictions, including any in other states or countries. Attach additional pages if necessary.			
Offense(s):	Date of offense(s):	County of conviction(s):	Sentence(s):
Murder 1st	1/27/2004	Riverside	25 years to life

#### 2. Briefly describe the circumstances of the crime(s) for which you are requesting a commutation (attach additional pages as necessary):

\*Please see: attachment A\*

#### 3. Explain why you are requesting a commutation (attach additional pages as necessary):

\*Please see: attachment B\*

#### 4. Provide a brief statement explaining why you should be granted a commutation (attach additional pages if necessary):

\*Please see: attachment C\*

#### 5. If you have paid any money or given any gift to anyone to assist in the preparation of this application, list their name, address, and amount paid or given (required by Penal Code section 4807.2):

No. I have not given any money, or gift in preparation of this application.

\*attachment A\*

Circumstances of the Crime

I was two months passed my 15th birthday when the crime occurred. Mark Gardner age 17, and I went to a burglary being committed by a 16, and 18 year old. They entered the victims home through the front door and beat the elderly homeowner to death. Mark and I snuck into the backyard of the home unaware that the homeowner had been harmed. Mark knocked on the backdoor angering the 18 year old inside of the home. I began to leave the backyard but Mark stayed. Not wanting to leave Mark I rejoined him by the backdoor. The 18 year old opened the door and pulled me inside of the home by my shirt. He revealed a gun in his waistband and yelled at me, "Is this what you wanted to see?!" Referring to the injured homeowner. I cowardly stole candy from the victims home instead of calling 911 for help. I was found guilty of 1st degree felony murder and sentenced to 25 years to life.

I Believe I Was Overly Prosecuted

I was arrested two months passed my 15th birthday and charged with 1st degree murder; although I did not in fact murder, or know a murder would, or could be committed by one of my peers.

I was prosecuted under California's Felony Murder Rule and never given a reasonable chance to take responsibility for my actions. A life prison sentences in not a chance. At every stage of my incarceration there has been the label of murderer. I was convicted, sentenced, and housed in State Prison as a 1st degree murderer. But in fact it is known that I am not and never will be a murderer.

I should have done something to save a man's life. I did not. For this I deserve a punishment, but I honestly believe a life prison term is not appropriate for what my actions were.

Because I was prosecuted under the Felony Murder Rule, there was no consideration given at sentencing to; Youthfulness at time of offense, and limited participation in the offense. I received a mandatory sentence of 25 years to life. The harshest punishment available for a 15 year old defendant.

The Person I Am

During my incarceration I have refrained from having a criminal mentality. Although surrounded by many others who live with a criminal mentality, I dwell upon the many positive staff interactions I have had, to instill within myself a set of morals that cannot be corrupted.

\*attachment B\* Page 2

Through positive living and actions, I have gained the support of my local community to the point of; when released I would be given the opportunity to speak at local high schools to warn of the dangers of criminal thinking.

Based upon my continued growth of positive character, and proven ability to maintain it throughout my entire incarceration, I believe I should be granted a commutation of sentence as I would truly be an asset to society.

While incarcerated I am often told by correctional officers, counselors, Doctors and other staff that my prison term is excessive for what my actions were. Many of them are impressed by the person I am. I know that I am a good person, and will be a good person while incarcerated and one day when released. It is my hope that you will give me the chance to prove it, a chance that I have never been given.

\*attachment C\*

I Should Be Granted A Commutation of Sentence

The most positive effect a commutation of sentence would have, is on my prison Term, and Program. I would have a realistic punishment for what my actions were. Energy could be rightfully spent on preparing myself for re-integration back into society; instead of an unjust prison term where I have to survive another decade in prison to be considered for release.

Today I have overwhelming support in the community. I have written and published positive books to warn struggling youth not to follow in my footsteps. I influence a web-site my sister runs pensideout.org that aspires to be a positive resource for youth and their parents. I've worked as an Assisted Care Giver, and currently work as a Teachers Aide in a lower functioning (E.O.P.) classroom, where I assist other inmates with Math and reading skills. I lead a life of service in prison and will do the same in the community.

When Released

I have the option of two homes to parole to. The first would be my mothers, and the second my sisters. Both homes are located in south Orange County where my current employment, and educational opportunities are located.

I will lead as normal a life as possible for a man who has been through the prison system. I am going to follow every law in the Penal Code. I will participate in community building and be of service. This is a fact.

For me to continue to spend 25 years to life in prison is a disservice to all parties involved. For this reason I humbly submit this Application For Executive Clemency.

STATEMENT OF NOTICE TO DISTRICT ATTORNEY AND DECLARATION UNDER PENALTY OF PERJURY

This application may be submitted to the Board of Parole Hearings for investigation and recommendation pursuant to Penal Code section 4812. This application may also be submitted to law enforcement or other agencies for investigation or recommendation.

Penal Code sections 4804 and 4805 require that you give the District Attorney in the county of conviction written notice of your intention to apply for a commutation. You must complete the Notice of Intent to Apply for Executive Clemency (attached) and mail it to the District Attorney before submitting this application to the Governor's Office.

I, Shawn Malone Khalifa, declare under penalty of perjury under the laws of the State of California that I  
(Print Full Name)  
have served the District Attorney of the County of Riverside with notice of my intent to apply for a  
(Name of County\*)  
commutation.

I further declare under penalty of perjury under the laws of the State of California that the information I have provided on this application is true and correct. I understand that any omission or misstatement of facts may result in the denial of the application and the filing of perjury charges against me.

  
Applicant's Signature

2/11/16  
Date

\*If Applicable, List Additional Counties Here (Send Notice of Intent to Apply for Executive Clemency to All Counties Listed)



NOV-07-2007 WED 01:29 PM SOUTHWEST PROBATION

FAX NO. 304 5705

P. 13/19

**COLLATERAL INFORMATION:**

Source: Deputy District Attorney-Quinn Baranski  
Defense Attorney-Amador L. Corona, Private Attorney  
Tasha Arneson, Juvenile Hall Mental Health Psychologist

Mr. Baranski reserved comment for sentencing.

Mr. Corona reserved comment for sentencing.

Dr. Arneson submitted the following statement, via e-mail:

Shawn was at SWJH (Southwest Juvenile Hall) for about 3 years. He came in when he was 15 years old and left after he graduated for high school when he was 18 years old. He was an extremely anxious kid the entire time we had him with a lot of obsessive-compulsive characteristics. He was tried on Lexapro and it was then discovered that he had a thyroid problem that increased his anxiety as well.

Shawn participated in Aggression Replacement Training, Moral Reasoning, and Social Skills Training. He became a peer mentor and would teach these same skills to minors assigned to him. The minors on the unit would refer to him as the stabilize of

NOV-07-2007 WED 01:20 PM WEST PROBATION

FAX NO. 304 5705

P. 14/18

1 the unit as he would stand up for the underdog and assure that kids weren't picked on.

2  
3 He was well-liked and trusted by his peers.

4  
5 I was amazed at his ability to be housed with his co-partners and separate  
6  
7 himself from them the duration of his stay. Shawn would take them on so to speak if  
8  
9 they were picking on kids with special needs, trying to initiate the new minors in a non-  
10  
11 positive way, etc. Although I felt, Shawn was scared of Rivera as were the rest of the  
12  
13 peers, he would stay committed to his leadership role.  
14  
15

16  
17 Shawn has written several letters to people at SWJH since being moved to the  
18  
19 jail and seems to be increasingly unstable. He has talked about killing himself and will  
20  
21 probably continue to be at risk for suicide when he is transferred to prison. I would  
22  
23 also have concerns about his safety if housed with Rivera."  
24

25  
26 DISPOSITION OF CO-DEFENDANT:  
27

28  
29 Fernando Gil Rivera was convicted of two counts of first degree murder on  
30  
31 October 18, 2007. On that day, special circumstances were found true, including  
32  
33 190.2(a)(17)(G) PC, 190.2(a)(17)(A) PC, 12022.53(D) PC, and 190.2(a)(3) PC. The  
34  
35 matter was referred to the Probation Department for a sentencing report; sentencing is  
36  
37 scheduled for December 14, 2007.  
38

39  
40 Mark Anthony Gardner, Jr. pled guilty to voluntary manslaughter and burglary on  
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42 September 17, 2007. Sentencing is scheduled for November 9, 2007.  
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50

1 Department of Corrections to collect restitution pursuant to  
2 Section 2085.5 of the Penal Code.

3 Pursuant to Penal Code Section 296, the defendant is  
4 ordered to provide a right thumb print, full palm print  
5 impressions and any other blood or saliva samples or biological  
6 samples requested by law enforcement for inclusion in the  
7 state's DNA identification database.

8 Further, the defendant is ordered not to own, possess  
9 or have under his control any firearm or deadly weapon for the  
10 rest of his life.

11 In this matter the defendant is ordered -- I'm sorry --  
12 he's given credits of 1,422 days credit for time served.

13 Mr. Khalifa, even though the sentence is 25 years to  
14 life, it is this Court's feeling that were you to continue with  
15 the course that you have chosen at this point in time that that  
16 minimum term of 25 years would satisfy -- would serve as an  
17 appropriate consequence for the conduct. And it is my hope,  
18 sir, that you would continue in the manner in which you have  
19 chosen at this time. I do feel that, based upon the facts and  
20 circumstances that this Court has read and considered, that were  
21 that to continue, you would be a positive and appropriate  
22 candidate for parole.

23 If you are granted parole, sir, you need to understand  
24 that that parole term can be for life. If you violate any term  
25 and condition of that parole, you could be returned back to  
26 state prison for that violation. And each violation could  
27 return you for up to one year. Do you understand that, sir?

28 THE DEFENDANT: Yes.

**FILED**

UNITED STATES COURT OF APPEALS

FEB 19 2015

FOR THE NINTH CIRCUIT

MOLLY C. DWYER, CLERK  
U.S. COURT OF APPEALS

SHAWN MALONE KHALIFA,

Petitioner - Appellant,

v.

BRENDA M. CASH, Warden,

Respondent - Appellee.

No. 12-56230

D.C. No. 5:10-cv-01446-GAF-  
PLA

Central District of California,  
Riverside

ORDER AMENDING

Before: PREGERSON, TALLMAN, and BEA, Circuit Judges.

The dissent filed on November 25, 2014 is hereby amended.

**FILED**

Khalifa v. Cash, No. 12-56230 (Amended Dissent)

FEB 19 2015

PREGERSON, Circuit Judge, dissenting:

MOLLY C. DWYER, CLERK  
U.S. COURT OF APPEALS

Shawn Khalifa<sup>1</sup> appeals his felony murder conviction arguing his Sixth Amendment speedy trial rights were violated.

The disposition correctly applied the first *Barker* factor by finding that the three-and-a-half year delay was “clearly lengthy and thus presumptively prejudicial.” The disposition correctly determined that the second factor was neutral because most of the delay was caused by Khalifa’s co-defendants’ requests for continuances.

Contrary to the disposition I submit that the third factor regarding the forcefulness of Khalifa’s assertion of his speedy trial right was not neutral. A

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<sup>1</sup> Khalifa was just two months beyond his fifteenth birthday when the crime occurred. He and Mark Gardner were acting as lookouts for a burglary while two older boys entered the victim’s home through the front door. Khalifa allegedly snuck through the backdoor and took a handful of candy from the victim’s kitchen. The older boys beat the elderly homeowner to death. Khalifa was found guilty of first degree felony murder and sentenced to twenty-five years to life. Based on Khalifa’s limited participation and his status as a juvenile, this sentence appears unusually harsh. As the Supreme Court has found, children like Khalifa lack maturity and have “an underdeveloped sense of responsibility leading to recklessness, impulsivity, and heedless risk-taking.” *Miller v. Alabama*, 132 S. Ct. 2455, 2464 (2012). Further, the brain of a fifteen year old is “not yet fully mature in regions and systems related to higher-order executive functions such as impulse control, planning ahead, and risk avoidance.” *Id.* at 2464, n.5 (internal citations omitted).

defendant's assertion of his speedy trial right is "entitled to strong evidentiary weight in determining whether the defendant is being deprived of the right." *Barker v. Wingo*, 407 U.S. 514, 531-32 (1972). Khalifa objected to continuances on five separate occasions during the eight month period between October 2006 and June 2007. To vindicate his right to a speedy trial he moved to sever his case from those of his co-defendants. While Khalifa consented to much of the delay, that consent does not neutralize the fact that he forcefully asserted his speedy trial rights for eight consecutive months. A delay of eight months on this record is most likely presumptively prejudicial. *See United States v. Gregory*, 322 F.3d 1157, 1162 n.3 (9th Cir. 2003). This third factor weighs in favor of Khalifa.

Finally, I submit that Khalifa was prejudiced by the eight month delay. Prejudice should be assessed by considering "the interests of defendants which the speedy trial right was designed to protect . . . : (i) to prevent oppressive pretrial incarceration; (ii) to minimize anxiety and concern of the accused; and (iii) to limit the possibility that the defense will be impaired." *Barker*, 407 U.S. at 532. Here, the disposition does not explicitly touch upon the first two interests. Khalifa was prejudiced by his pretrial incarceration. He spent over three years in jail awaiting trial. Khalifa was arrested on January 30, 2004, three days after the crime was committed and about two months beyond his fifteenth birthday. His trial started on

September 17, 2007, a couple months before his nineteenth birthday. In *Barker*, the Supreme Court determined that “time spent in jail awaiting trial has a detrimental impact on the individual.” *Id.* Khalifa’s three-and-a-half year pretrial incarceration and the anxiety it caused him—a teenager awaiting trial for felony murder—weigh in favor of finding that Khalifa was prejudiced by the delay.

The delay also impaired, and thus prejudiced, Khalifa’s defense because the only non-biased eyewitnesses, one of whom was Erick Castillo, left the country and moved to Mexico during the delay. *See Id.* at 532 (“If witnesses . . . disappear during a delay, the prejudice is obvious.”). Because lengthy delays often cause the loss of exculpatory evidence and testimony, “impairment of one’s defense is the most difficult form of speedy trial prejudice to prove.” *Doggett v. United States*, 505 U.S. 647, 655 (1992). For this reason, “consideration of prejudice is not limited to the specifically demonstrable.” *Id.*

Further, the California Court of Appeal’s factual determination that witness Castillo’s preliminary hearing testimony was consistent with co-defendant Mark Gardner’s testimony was refuted by clear and convincing evidence. Khalifa’s appellate brief demonstrated that Castillo’s preliminary hearing testimony varied from Gardner’s testimony on several points; most notably co-defendant Gardner testified to facts that made him appear less culpable. Gardner testified that he was

only in the side yard briefly before waiting in front of the house for Khalifa, whereas witness Castillo saw Khalifa and Gardner leave the side yard together. The jury may have discounted Gardner's account as biased if Castillo had testified at trial because it appears as if Gardner may have twisted the facts to minimize his involvement. The jury might have taken this into consideration when weighing Gardner's credibility. Co-defendant Gardner also portrayed Khalifa as having a more active role in the crime by testifying that Khalifa exited the home only seconds before Rivera and Pena (the men who beat the victim to death), not five to ten minutes before as explained by Castillo. Gardner's version makes it more likely that Khalifa was in the home during the victim's murder, however, Castillo's account presents an issue as to Khalifa's presence during and his knowledge of the killing. Had the jury heard these varied accounts it would have had to weigh the credibility of both witnesses and it is likely there would have been more discussion about co-defendant Gardner's motivations for testifying. Likely, there also would have been a more in-depth consideration of the extent of Khalifa's involvement. For these reasons, the loss of Castillo as a witness at trial prejudiced Khalifa.

Three of the four Barker factors weigh in Khalifa's favor and support a finding of a violation to his right to a speedy trial under the Sixth Amendment. Therefore, Khalifa's habeas petition should have been granted.



The only issue before this panel was whether Khalifa was denied his right to a speedy trial. Before the state courts and the district court, Khalifa challenged the constitutionality of his 25 years to life sentence as unconstitutionally cruel and unusual on account of his age and his relative culpability for the murder. Before our court, Khalifa petitioned for a certificate of appealability challenging the constitutionality of his sentence as cruel and unusual under the Eighth Amendment, but the motion was denied. **Docket 3.** Even the deputy attorney general in this case acknowledged the harshness of Khalifa's sentence for a kid who went into a house and filled his pockets with candy.

Khalifa played the relatively minor role of lookout during the robbery of an elderly man. Much of the evidence against Khalifa came from Gardner, one of Khalifa's co-defendants who testified for the prosecution in exchange for a lighter sentence. Gardner testified that the night of the offense, he was hanging out with Rivera, Pena, and Khalifa. Khalifa was the youngest at 15 years of age. The group began discussing their need for money and someone suggested robbing an elderly neighbor.

The four boys walked toward the victim's home, Rivera and Pena in front and Gardner and Khalifa following behind. Gardner explained that Rivera and Pena told Gardner and Khalifa to wait outside while Rivera and Pena went up to

the victim's front door and entered. Gardner testified that he and Khalifa went through a gate leading to the victim's backyard. Gardner also testified that Khalifa entered the victim's home, was inside the kitchen for a couple minutes, and looked through the kitchen drawers. Khalifa took candy from the victim's kitchen and then left through the back door.

There was no evidence that Khalifa saw the victim being beaten, but the evidence indicates that Khalifa may have heard the victim moan. Khalifa and Gardner then returned to the front of the home. After killing the homeowner, Rivera and Pena came out the front door and drove down the street in the victim's car. Khalifa got in the car at the prompting of Rivera and Pena.

Khalifa was tried and convicted of first degree felony murder in connection with his alleged participation in the burglary and robbery. He was sentenced to 25 years to life, the most severe punishment available for a 15 year old convicted of first degree murder in California. *See* Cal. Penal Code § 190.5. In fact, Khalifa received the same maximum sentence he would have received had he entered through the front door and participated in the killing of the victim.

He had just turned 15 at the time of the crime. He did not kill anyone and there is no evidence that he could have foreseen that the victim would be killed; he entered the victim's kitchen at the rear of the house and took some candy while

two older boys robbed and beat the victim in the living room in the front of the house. He was sentenced to 25 years to life.

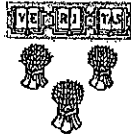
The Supreme Court's recent decisions tell us that "children are constitutionally different from adults for purposes of sentencing." We also are told by the Court that "when compared to an adult murderer, a juvenile offender who did not kill or intend to kill has a twice diminished moral culpability." *Miller v. Alabama*, 132 S. Ct. 2455, 2468 (2012) (quoting *Graham v. Florida*, 130 S.Ct. 2011, 2027 (2010)).

Further, "compared to adults, juveniles have a lack of maturity and an underdeveloped sense of responsibility; they are more vulnerable or susceptible to negative influences and outside pressures, including peer pressure; and their characters are not as well formed." *Graham*, 560 U.S. at 68 (internal quotations omitted).

In addition, as Justice Breyer notes in his concurrence in *Miller*, the felony murder rule "traditionally attributes death caused in the course of a felony to all participants who intended to commit the felony, regardless of whether they killed or intended to kill. This rule has been based on the idea of transferred intent; the defendant's intent to commit the felony satisfies the intent to kill required for murder." *Miller*, 132 S.Ct. at 2476 (internal quotations and citations omitted).

Justice Breyer further noted that the “theory of transferring a defendant's intent is premised on the idea that one engaged in a dangerous felony should understand the risk that the victim of the felony could be killed, even by a confederate. Yet the ability to consider the full consequences of a course of action and to adjust one's conduct accordingly is precisely what we know juveniles lack capacity to do effectively.” *Id.* (internal citation omitted).

Given Khalifa's age and his minor involvement in the crime, his sentence appears unusually harsh and cruel. I believe that this issue should have been considered.



THE LAW OFFICES OF  
**JAMES W. WHITEHOUSE, ESQ.**  
32742 ALIPAZ # 65  
SAN JUAN CAPISTRANO, CA, 92675  
(949) 678 - 9868



May 26<sup>th</sup>, 2015

To:  
Governor Edmund G. Brown Jr.  
c/o State Capitol, Suite 1173  
Sacramento, CA 95814

Re:  
Shawn Khalifa G02628  
C.M.C. East B-3238  
P.O. 8101  
San Luis Obispo, Ca. 93409

Dear Governor Brown,

I represented Shawn Khalifa in taking his direct appeal to the Federal Ninth Circuit Court of Appeals in 2014, and I am writing you now to ask you to consider his Petition for Commutation of Sentence.

Shawn Khalifa was just a couple weeks past his 15<sup>th</sup> birthday when he was arrested and direct-filed as an adult in the case of the death of Mr. Love. He was just a couple months shy of his 19<sup>th</sup> birthday when his trial began. He had spent three and a half years in jail awaiting trial.

On the day his jury selection was begun, his codefendant (who was 17 at the time he was arrested and who had also spent three and a half years in jail awaiting trial) agreed to testify against Shawn in exchange for being given a seven-year sentence.

Shawn's codefendant's testimony was the only evidence against Shawn at trial.

Even if one believes the testimony of Shawn's codefendant, all Shawn Khalifa was guilty of was being 15 and finding himself in the middle of a quickly developing situation which he did not know how to respond to.

According to the testimony of Shawn's codefendant he and Shawn overheard two older boys talking of robbing an elderly man they knew. According

to the codefendant he and Shawn walked the codefendant home which took them along the same route as the older boys. According to the testimony of the codefendant he and Shawn were told by the older boys to "stand watch" as they entered the victim's home. According to the testimony of the codefendant neither he nor Shawn agreed to do this. According to the codefendant he and Shawn waited outside until they got curious and went to the victim's side yard to look in the kitchen window to see what was happening. According to the codefendant they could see nothing and Shawn went in the back door and looked around the victim's kitchen. According to the codefendant Shawn appeared to take nothing from the home. According to the codefendant Shawn ran out of the house and when asked what happened inside Shawn didn't want to talk about it. According to the codefendant he and Shawn continued walking to the codefendant's home before the older boys exited the victim's home.

But according to the only unbiased witnesses the facts were much different. According to the Castillo brothers who were sitting across the street, Shawn and the codefendant did not walk to the victim's home with the older boys - they were walking down the same street but were fifty yards behind the older boys. According to the Castillo brothers the older boys knocked on the victim's door and were talking to the victim before Shawn and the codefendant walked past the house and the older boys never told them to "stand watch." According to the Castillo brothers Shawn and the codefendant did not "stand watch" in front of the victim's home but walked several houses down the street before waiting. According to the Castillo brothers Shawn and the codefendant eventually went through the side gate to the victim's back yard but only stayed there for two or three minutes before both came running out and ran down the street.

Prior to trial the Castillo brothers fled to Mexico to avoid testifying.

At trial Shawn's jury asked the judge if there was any possible sentence they could give him other than the felony murder sentence of twenty-five to life. They were told there was none.

Even by the worst evaluation of the evidence, Shawn Khalifa did not kill Mr. Love, nor did he participate in Mr. Love's death. Shawn Khalifa suffers from the Felony Murder Rule and the practice of direct-filing juveniles in adult court, as well as the ridiculous practice of paying defendants (with decades off their sentences) in exchange for testifying against their codefendant. Shawn also suffered from the almost unbelievable fate of spending almost a fifth of his entire life in jail just awaiting trial because his family was too poor to post bail.

Shawn's life prior to his arrest was marked with no indications he was a troubled child. And his life after arrest has similarly been marked with nothing

but incredible performance. His prison record shows a commitment to education and to helping others.

I'm asking you to consider the question Shawn's jury asked at the time they heard his case: Is twenty-five years to life a just sentence for someone who, at the age of fifteen, walked into the side yard of a man who was being robbed and killed?

I don't believe it is.

Although I do not believe Shawn is guilty of anything, Shawn is not asking you to overturn his conviction. Shawn has already spent over eleven years in prison and he is merely asking you to agree that this is more than enough time in prison for someone who, at the age of fifteen, found himself in a situation for which he had no tools to respond.

Please review Shawn's case and his post-conviction record and commute his sentence.

Thank you.

Sincerely,



James W. Whitehouse



June 23, 2015

To:

Governor Edmund G. Brown Jr.  
c/o State Capitol, Suite 1173  
Sacramento, CA 95814

Re:

Shawn Khalifa G02628  
C.M.C. East B-3238  
P.O. 8101  
San Luis Obispo, Ca. 93409

Dear Governor Brown,

I am writing you on behalf of inmate Shawn Khalifa who is serving time at the California Men's Colony in San Luis Obispo, to ask you to please consider his Petition for Commutation of Sentence.

The reason I feel so passionate about this young man's freedom is because I believe that if he is free he will offer his hands and heart to service others. This young man will be able to tell his testimony to at risk youth using his story and his books. I read Shawn's first book titled Proposition 21 and soon began written communication with him. I just finished reading his second book, My Bleeding Pen: A Poem Book. This book gave me a glimpse at the reality of Shawn's life behind bars.

I am the Prevention Education Specialist for Laura's House, we are a community based nonprofit organization dedicated to changing social beliefs, attitudes, and the behaviors that perpetuate domestic violence, we offers free educational workshops and presentations for middle and high school students to address the wide spread issue of teen dating violence. My position leads me to speak to incarcerated youth in Orange County CA. and I also mentor a young man who is currently incarcerated at Joplin Detention Center in Trabuco Canyon CA. Through my communication with Shawn I have been able to get worthy counsel from him on how to handle my mentee. Shawn has taught me the language and the culture that helps me motivate the youth that I visit during my professional travels.

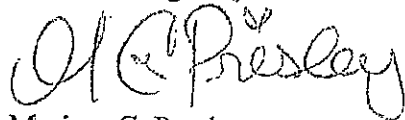


His prison record shows a commitment to education, he has sought and completed most of the certification programs offered in prison. He is currently in charge of all the Life Skills groups at the prison and he does this with passion and professionalism. He feels a genuine obligation to be of service to others. I believe if his sentence is reduced and if he was free he would make it his duty and life's work to help other at risk youth lead a life of promise.

I have had the opportunity to speak on the telephone with Shawn and what appeals to me about him is his gentle, soft spoken, intelligent way, he is an inspirational young man and one day when he is free I promise to offer him an internship and a platform so he can speak to the youth of our county. After reviewing Shawn's case and reading his books I hope you will see a favorable outcome for Shawn and his family.

Governor Brown, I don't have the words to adequately articulate my gratitude to you, thank you. Thank you for your time, for all you do and for considering reviewing Shawn's case and his post-conviction record and commuting his sentence.

Warmest Regards,



Marissa C. Presley  
Prevention Education Specialist  
[mpresley@laurashouse.org](mailto:mpresley@laurashouse.org)

Petitioning Congress and Office of the Governor of the State of California

## **Congress and Office of the Governor of the State of California: Give Clemency to Shawn Malone Khalifa & Revise Felony Murder Rule**

The felony murder goes against the punishment fitting the crime. It goes against all that is fair, and liberty and freedom that we in American claim to have. Many families and youth are being wrongly convicted and are made to grow up in prisons due to this law. Young people are tried as adults for crimes they did not commit and are not receiving a fair trial based on their maturity and involvement in the crime. Shawn Malone Khalifa is serving a lengthy sentence for a crime he did not commit. The judge herself state during sentencing "I know you did not commit this crime, but my hands are tied because of this law." Does that sound right to you? It is 100% wrong. Shawn deserves clemency and to be released. He has spent nearly 10 years in the juvenile and now adult prison system for a crime he did not commit, and we as family cannot keep our mouths shut about this issue. By signing this petition you are giving a voice to so many young people and families affected by this ridiculous law. We need to fight for what is right. My son has been convicted of first degree murder from looking in a window at the age of 15. An innocent mistake has cost him his life and liberties, as a family we have suffered and filled our pillows with tears. We want to revise the felony murder rule so that it does not involve minors and so they can be tried according to their crimes. If they did not commit a crime there should be no trial or payment. Below is a list of what is wrong with the felony murder rule as quoted from JoAnne Jones.

["What's wrong With the Felony Murder Rule- Common Sense:

1. It is fundamentally unfair and in violation of basic principles of individual criminal culpability to hold one felon liable for the unseen and unagreed-to results of another felon's action.
2. The felony murder rule operates as a matter of law upon proof of the intent to commit a felony to relieve the prosecution of its burden of proving intent to kill, which is a necessary element of murder.
3. The intention to commit a felony does not equal the intention to kill, nor is the intention to commit a felony, by itself, sufficient to establish a charge of murder.
4. The felony murder rule violates the Fourteenth Amendment's guarantee of due process, more specifically, equal protection of the law, because no defense is allowed on the charge of first-degree murder, only the underlying felony.
5. The purpose of creating degrees of murder is to punish with increased severity the more culpable forms of murder, but an accidental or unknown killing during the commission or attempted commission of a felony is punished more severely than all other murder charges with exception to first degree murder.

6. The felony murder rule erodes the relation between criminal liability and moral culpability in that it punishes all homicides in the commission, or attempted commission, of the proscribed felonies, whether intentional, unintentional, or accidental, without proving the relation between the homicide and the perpetrator's state of mind.

7. Holding one or many criminally liable for the bad results of an act which differs greatly from the intended results is based on a concept of culpability which is totally at odds with the general principles of jurisprudence.

8. The basic rule of culpability is further violated when felony murder is categorized as first-degree murder because all other first-degree murders (carrying equal punishment) require a showing of premeditation, deliberation, and willfulness, while felony murder only requires a showing of intent to do the underlying felony.

9. While the felony murder rule survives in California, and other states, the numerous modifications and restrictions of it by some states courts and legislatures throughout the United States reflect dissatisfaction with the basic harshness and injustice of the doctrine and call into question its continued existence.

10. The felony murder rule can be used by prosecutors in a manner so as to cause grossly disproportionate sentencing, depending on the circumstances of each individual case.

11. The felony murder rule is unconstitutional because the presumption of innocence is thrown out. The prosecutor must only prove intent to commit the original felony; once done, first degree murder attaches to the underlying felony even though intent, (mens rea,) to commit murder does not have to be proved.

12. The felony murder rule is unconstitutional because it violates the Eighth Amendment: cruel and unusual punishment, grossly disproportionate sentencing to the crime(s) actually committed.

13. The felony murder rule bears no rational relationship or equity in its two penalties, with the penalties of other California murder laws, including, at times, the charge of first-degree murder."]

So many mothers are fighting for their sons and daughters. Governor Brown give clemency to Shawn Malone Khalifa and Revise the Felony Murder Rule as it relates to minors so all can receive a fair trial and not spend their life in prison for looking through a window. Help bring these innocent babies home to their families.

As a minimum Shawn deserves his sentence reduced, we are in support of SB 260 which is against youths under the age of 17 put into adult prisons.

Letter to

Congress and Office of the Governor of the State of California

Give Clemency to or reduce the sentence of Shawn Malone Khalifa /Revise Felony Murder Rule

In support of SB 260 which is against youths under the age of 17 being put into adult prisons.

RECEIVED  
SUPERIOR COURT OF CALIFORNIA  
COUNTY OF RIVERSIDE

AUG 10 2010

COURT OF APPEAL - STATE OF CALIFORNIA  
FOURTH APPELLATE DISTRICT  
DIVISION THREE

FILED  
SUPERIOR COURT OF CALIFORNIA  
COUNTY OF RIVERSIDE

AUG 10 2010

Office of the County Clerk  
Riverside County Superior Court - Criminal (Riverside)  
4100 Main Street  
Riverside, CA 92501

THE PEOPLE,  
Plaintiff and Respondent,

G040331

Sup. Ct. No. SWF006720

v.

SHAWN MALONE KHALIFA,  
Defendant and Appellant.

**\*\* REMITTITUR \*\***

I, Stephen M. Kelly, Clerk/Administrator of the Court of Appeal of the State of California, for the Fourth Appellate District, Division III, do hereby certify that the attached is a true and correct copy of the original opinion or decision entered in the above-entitled cause on April 07, 2010 and that this opinion has now become final.

☐ Appellant ☐ Respondent to recover costs  
☐ Each party to bear own costs  
☒ Costs are not awarded in this proceeding  
☐ See decision for costs determination

Witness my hand and the Seal of the Court affixed at my office this August 09,  
2010;



Stephen M. Kelly  
Clerk/Administrator

By: \_\_\_\_\_

Deputy Clerk

cc: All Counsel (copy of remittitur only, Cal. Rules of Court, Rule 8.272(d).)

**COPY**

**NOT TO BE PUBLISHED IN OFFICIAL REPORTS**

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT    COURT OF APPEAL-4TH DIST DIV 3  
DIVISION THREE                      FILED  
APR 07 2010

Deputy Clerk \_\_\_\_\_

THE PEOPLE,

Plaintiff and Respondent,

v.

SHAWN MALONE KHALIFA,

Defendant and Appellant.

G040331

(Super. Ct. No. SWF006720)

OPINION

Appeal from a judgment of the Superior Court of Riverside County,  
Michael S. Hider and Judith C. Clark, Judges. Affirmed.

Patricia L. Brisbois, under appointment by the Court of Appeal, for  
Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant  
Attorney General, Gary W. Schons, Assistant Attorney General, Lilia E. Garcia and  
Arlene A. Sevidal, Deputy Attorneys General, for Plaintiff and Respondent.

\* \* \*

A jury convicted defendant Shawn Malone Khalifa of first degree murder (Pen. Code, § 187, subd. (a)),<sup>1</sup> in connection with Khalifa's alleged participation in the burglary and robbery of 77-year-old Hubert Love's home. Fernando Gil Rivera, Mark Anthony Gardner, Jr., and defendant were charged with the murder of Love; Rivera was also charged with the murder of Juan Peña, who allegedly participated in the murder of Love. Defendant, 15 years old on the date of the murder, appeals his conviction and sentence on five grounds: (1) the trial court prejudicially violated his right to a speedy trial by refusing to grant his motion to sever despite repeated continuances of the trial date; (2) the court prejudiced his right to a jury trial by instructing the jury that Gardner, who testified for the prosecution, was an accomplice as a matter of law; (3) the court erred by failing to instruct the jury with the lesser included offense of second degree murder; (4) insufficient evidence was presented to support his conviction for felony murder (§ 189); and (5) defendant's sentence of 25 years to life constitutes cruel and unusual punishment. We reject each of defendant's contentions and affirm the judgment.

### FACTS

The testimony of Gardner, if believed, establishes the facts set forth in the next two paragraphs.

Rivera and Gardner were with defendant at defendant's house at approximately 8:00 p.m., on January 27, 2004. Sometime later, Peña arrived at defendant's house. Peña and Rivera discussed their respective money deficiencies. Someone suggested robbery as a way to fill their empty wallets, and it was then

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<sup>1</sup>

All statutory references are to the Penal Code unless otherwise stated.

mentioned that "an older guy" lived down the street who could be robbed. No one disagreed with this idea. After this conversation, all four walked toward Love's residence, defendant and Gardner following behind Rivera and Pena at a distance of approximately 15 to 20 feet.

Pena and Rivera walked toward and entered the front door of Love's home. Defendant walked to the back of the house and told Gardner to wait outside of the front of the house. Defendant entered the house and looked through the kitchen drawers for approximately one minute. Defendant was in the house for approximately two to three minutes. Defendant came back from the back of the house and through the gate on the side of the house. Seconds later, Rivera and Pena came out of the front door. Defendant told Gardner, "let's get out of here." Defendant and Gardner walked away from the house; Rivera and Pena got into Love's car and drove down the street. Defendant got into the car at the prompting of Rivera and Pena, but Gardner declined to do so. The next morning, defendant told Gardner that Rivera and Pena "beat the dude to death."

After finding Love's car, which had been abandoned on a dirt road, police discovered Love's dead body in his home. Defendant, along with Rivera and Gardner, were accused by information with the murder of Love; the information alleged the murder was committed while the three were committing robbery (§ 211) and burglary (§ 459). Rivera alone was charged with an additional count of murder — that of Pena, whose dead body was found in a canal. Gardner negotiated a plea bargain whereby he pleaded guilty to voluntary manslaughter and robbery in exchange for his testimony during the trial of defendant and Rivera. Rivera pleaded guilty to the Love murder, and was convicted by a jury of the Pena murder. A jury convicted defendant of first degree murder and found the felony murder special circumstances to be true. The court sentenced defendant to a term of 25 years to life in state prison.

## DISCUSSION

We shall address each of defendant's arguments in turn, with additional facts provided in each section as necessary.

### *Right to Speedy Trial*

Defendant asserts his right to a speedy trial was violated by the court's repeated continuances of his trial and the court's denial of defendant's motion to sever his case from that of his codefendants. Absent a finding of good cause, waiver, or consent, a trial court must dismiss a criminal action "when a defendant is not brought to trial within 60 days of the defendant's arraignment on an indictment or information . . . ." (§ 1382, subd. (a)(2); see also § 1050, subd. (a).) "[O]n appeal from a judgment of conviction a defendant asserting a statutory speedy trial claim must show that the delay caused prejudice, even though the defendant would not be required to show prejudice on pretrial appellate review." (*People v. Martinez* (2000) 22 Cal.4th 750, 769.)

"When two or more defendants are jointly charged with any public offense, whether felony or misdemeanor, they must be tried jointly, unless the court order[s] separate trials." (§ 1098.) "A court's denial of a motion for severance is reviewed for abuse of discretion, judged on the facts as they appeared at the time of the ruling." (*People v. Coffman and Marlow* (2004) 34 Cal.4th 1, 41.)

Defendant was arrested on January 30, 2004, following the execution of a search warrant at his home. An initial felony complaint against defendant, Rivera, and Gardner was filed on February 3, 2004. Defendant pleaded not guilty to all charges on February 26, 2004. Defendant then waived time and consented to multiple continuances of his preliminary hearing from March 2004 through September 2005. Following a preliminary hearing conducted in September and November 2005, defendant was held to



answer on the complaint on November 4, 2005. An information was filed on November 16, 2005.

Defendant waived time for speedy trial to September 12, 2006. On September 12, 2006, all parties stipulated to continue the trial to October 17, 2006. Between October 17, 2006 and June 19, 2007, the court repeatedly continued the trial at the request of the codefendants and over defendant's objection.

On October 17, 2006, counsel for the codefendants requested a continuance because counsel for Gardner was in another trial. Counsel for defendant answered ready and objected to a continuance. The court found "good cause to take it out to [December 5, 2006]."

On November 29, 2006, counsel for Rivera again asked for a continuance; defendant again opposed the continuance and answered ready for trial. Defendant argued that if the court were to continue the trial again, he wished to sever the other case and begin his trial. The court found good cause to continue the trial to January 23, 2007. The court also ordered the attorneys "not to get involved in any trial that will interfere with the January 23rd date."

On January 18, 2007, counsel for Gardner was in trial on another case. Defendant again objected and again orally moved for severance. The court noted it would consider only a written motion for severance. The court stated: "[Defendant], over your objection, I'm going to keep you in the case for the present time. And I will trail you to exactly the same date, February 26th, for readiness conference and jury trial, last day March 8th." The court again ordered all counsel to "stay out of trial, let's get this thing done. It is very old."

On February 26, 2007, the prosecutor and Gardner's counsel were in a trial together and requested yet another continuance. Defendant again objected and asked that his motion for severance be heard. The court, finding good cause, continued the trial to April 16 and set the motion for hearing.

On April 4, 2007, the court denied defendant's motion: "I think there's much merit to what you're saying, and I'm very inclined, if there's another continuance, [to] sever these matters. [¶] Gentlemen, what I want to do is pick a date certain. It has to be June. . . . [¶] We cannot go on indefinitely. . . . [Defendant] does have rights. The Court is here to protect everyone's rights to the best of its ability. But to sever now would be a horrible thing in as long as I am convinced that in the very near future we are going to trial."

The court again continued the trial to June 19, 2007, based upon a finding of good cause. Defendant then thrice waived his time for a speedy trial and the court continued the trial (first to July 12, then to August 9, then to August 20) without objection by the parties. Pretrial motions began on August 28. Defendant agreed to a continuance of the trial from September 6 to September 10.

On September 10, 2007, the People provided defense counsel with previously undisclosed evidence, consisting of audio recordings of portions of the police investigation. The court severed Gardner's case from that of defendant and Rivera, finding this to be the most equitable solution because defendant and Rivera did not wish to have a further continuance. Jury trial for defendant and Rivera began on September 17; Gardner pleaded guilty the same day.

The record suggests the court did not intend to delay the trial eight months over the objection of defendant when it began granting continuances, but instead hoped at each hearing it could keep all defendants joined while delaying only briefly defendant's right to a speedy trial. Section 1050.1 indicates that a continuance of one defendant's trial for good cause shown "shall, upon motion of the prosecuting attorney, constitute good cause to continue the remaining defendants' cases so as to maintain joinder. The court or magistrate shall not cause jointly charged cases to be severed due to the unavailability or unpreparedness of one or more defendants unless it appears to the court or magistrate that it will be impossible for all defendants to be available and prepared

within a reasonable period of time.” The court found what it deemed to be good cause at each hearing for continuing the trial with regard to the codefendants. As the court granted the continuances in small chunks and each time was convinced counsel would be ready for trial the next time, it appears the court sought to apply the law in good faith.

But there is some point at which a trial court abuses its discretion by allowing repeated conflicts of codefendants’ counsel to override the expressed desire of a defendant to go to trial without further delay. A blind adherence to the statutory preference for jointly trying defendants is inappropriate. (*Arroyo v. Superior Court* (2004) 119 Cal.App.4th 460, 467 [granting writ of prohibition where court granted continuance of trial date solely to maintain joinder of parties without considering speedy trial rights of the petitioner].) Moreover, “good cause is *not* shown by . . . chronically congested courts and overburdened appointed counsel.” (*Greenberger v. Superior Court* (1990) 219 Cal.App.3d 487, 495; see also *People v. Johnson* (1980) 26 Cal.3d 557, 575 [“calendar conflict on the part of defense counsel or the trial court cannot routinely serve to justify denial of a motion to dismiss when trial is postponed beyond the statutory period”] (*Johnson*).) The sheer length of delay in this action over the objection of defendant is difficult to justify under established case law.

But we need not definitively answer the question of whether the court abused its discretion in this case. Because defendant did not seek extraordinary pretrial relief and instead has appealed the court’s alleged denial of his speedy trial rights after his conviction, the determinative question in this appeal is whether defendant has established that the delays resulted in prejudice. (*Johnson, supra*, 26 Cal.3d at p. 574.)

Defendant contends he was prejudiced in two ways. First, defendant claims Gardner would not have testified against him had the motion to sever been granted because Gardner pleaded guilty six months later. Second, defendant claims the delay in his trial resulted in a witness (Erick Castillo), who testified at the preliminary hearing, being unavailable at trial (he moved to Mexico and refused to return to testify).

Defendant's arguments are speculative and contradictory. As a general matter, because the murder case against defendant was an initial filing, it could have been refiled against defendant even if the court dismissed the action for lack of a speedy trial. (See *Johnson, supra*, 26 Cal.3d at p. 574 [no prejudice because "[t]his is not a case in which the statute of limitations would have been a bar to new charges, or one in which a dismissal would itself have barred refiling"].) Thus, the case did not need to proceed immediately after defendant's objections to the continuances granted by the court. Defendant does not contest this point, but instead claims he sought severance and a speedy trial rather than outright dismissal of the case.

But as defendant recognizes, the prosecutor procured the testimony of Gardner after it was determined he could not use the preliminary hearing testimony of two witnesses who were unavailable at trial. The court, at the insistence of defendant and the codefendants, refused to allow the prosecutor to use Castillo's preliminary hearing testimony at trial, finding the prosecutor had not shown due diligence. The identical chain of events — Gardner testifying against him pursuant to a plea bargain — may have occurred had defendant's motion to sever been granted and his trial proceeded thereafter.

Even assuming defendant had been tried immediately after his motion to sever, and Castillo had been available and testified against defendant at his trial, defendant still has not established prejudice. Defendant claims Castillo's testimony was more favorable to him than that of Gardner, in that Castillo said he saw Gardner go into the back yard with defendant and saw only Pena and Rivera inside the house and not defendant. But Castillo's testimony was perfectly consistent with Gardner's testimony with regard to defendant. The fact that Castillo did not perceive the precise facts perceived by and testified to by Gardner does not mean Castillo's testimony would have led to a better result than that obtained with Gardner's testimony. And, as detailed below with regard to the sufficiency of the evidence supporting the conviction, the prosecution

also had additional, corroborating evidence that supported both the testimony of Gardner and the testimony of Castillo.

*Instruction That Gardner Was an Accomplice as a Matter of Law*

Defendant also posits the court erred by instructing the jury with CALCRIM No. 335. As provided to the jury, this instruction read in relevant part: "If the crime of murder was committed, then . . . Gardner was an accomplice to that crime. [¶] You may not convict the defendant of murder based on the statement/or testimony of an accomplice alone. You may use the statement/or testimony of an accomplice to convict the defendant only if: [¶] 1. The accomplice's statement/or testimony is supported by other evidence that you believe; [¶] 2. That supporting evidence is independent of the accomplice's statement/or testimony; [¶] AND [¶] 3. That supporting evidence tends to connect the defendant to the commission of the crime. . . ."

Under the facts of this case, the court was required to instruct the jury on the principles governing testimony by accomplices, including the need for independent, corroborating evidence to support a conviction. (§ 1111; *People v. Tobias* (2001) 25 Cal.4th 327, 331.) Defendant's trial counsel did not object to this instruction but instead stated "I believe it's correct" after reading the instruction as modified by the court. Defendant's attorney expended considerable effort in his closing argument on the ramifications of CALCRIM No. 335, explaining to the jury the "special rules that you're given as jurors when you're dealing with accomplices. And these special rules are there because accomplices have this tremendous motivation or reason to lie, to not be truthful and that is because they want to save their own skin." As defendant did not object to its use at trial, the People rightly conclude defendant forfeited any objection to CALCRIM No. 335.

Defendant, however, contends his counsel provided ineffective assistance by stipulating to CALCRIM No. 335 rather than advocating for CALCRIM No. 334,

which leaves the factual determination of whether a witness is an "accomplice" to the jury. ""Reviewing courts will reverse convictions on the ground of inadequate counsel only if the record on appeal affirmatively discloses that counsel had no rational tactical purpose for his act or omission."" (People v. Bradford (1997) 14 Cal.4th 1005, 1052.) Defendant claims that if the jury did not find Gardner to be an accomplice, this would have assisted defendant because they might then also have found defendant's participation in the crime to be insufficient to deem him guilty of felony murder. However, there is a rational basis in the evidence to distinguish between the guilt of defendant and Gardner. If the jury found Gardner was not an accomplice, it could have convicted defendant based solely on the testimony of Gardner, without any corroborating evidence. Defense counsel's decision at trial to consent to CALCRIM No. 335 rather than CALCRIM No. 334 does not constitute ineffective assistance of counsel.

*Failure to Instruct Jury on Lesser Included Offense of Second Degree Murder*

Next, defendant argues the court failed to instruct the jury on second degree murder, despite an alleged sua sponte duty to do so. The prosecutor indicated the court should instruct the jury on second degree murder, noting it was "factually almost impossible to get there without convicting [defendant] on a first degree murder" but reasoning defendant "has a right to [the instruction] if he wants it because there's a theory about how you can get there." Counsel for defendant, after consulting with defendant, stated, "for tactical reasons, we will not ask for the second degree murder instruction." The court then stated: "The defense, having tactically determined not to seek the second degree murder instruction, [and] this Court having determined that it would be . . . quite a contorted argument to get there, this Court will not give second degree murder instructions at the request of the defense."

During jury deliberations, the jury sent a note to the court stating it “would like to know is there a lesser charge we can find [defendant] guilty of . . . .” Defendant’s counsel concurred with the court’s response to the jury — “No.”

“California law has long provided that even absent a request, and over any party’s objection, a trial court must instruct a criminal jury on any lesser offense ‘necessarily included’ in the charged offense, if there is substantial evidence that only the lesser crime was committed. This venerable instructional rule ensures that the jury may consider all supportable crimes necessarily included within the charge itself, thus encouraging the most accurate verdict permitted by the pleadings and the evidence.” (*People v. Birks* (1998) 19 Cal.4th 108, 112; see also *People v. Daya* (1994) 29 Cal.App.4th 697, 713 [by instructing on the lesser included charge of second degree murder, “[t]he court properly dispensed its role of presenting the full range of possible verdicts une[n]cumbered by the strategy of both the prosecution and defense to force an all-or-nothing choice to the charge of first degree murder”].)

As noted by the court, it is questionable whether there is substantial evidence in the record to support a rational determination that defendant committed second degree murder but not felony murder (first degree). Indeed, it is an open question generally in California “whether second degree murder is a lesser included offense when, as here, the prosecution proceeds solely on the theory that the killing is first degree murder under the felony-murder rule and does not argue that the killing is first degree murder because it is willful, deliberate, and premeditated.” (*People v. Romero* (2008) 44 Cal.4th 386, 402.)

There is no need here to parse the evidence or resolve this legal controversy because, even assuming the court should have instructed the jury on second degree murder, defendant invited instructional error. (*People v. Horning* (2004) 34 Cal.4th 871, 905 [“We need not decide whether the evidence warranted an instruction on second degree murder in this case because we find any error . . . invited”].) “[A] defendant may

not invoke a trial court's failure to instruct on a lesser included offense as a basis on which to reverse a conviction when, for tactical reasons, the defendant persuades a trial court not to instruct on a lesser included offense supported by the evidence. [Citations.] In that situation, the doctrine of invited error bars the defendant from challenging on appeal the trial court's failure to give the instruction." (*People v. Barton* (1995) 12 Cal.4th 186, 198.)

In arguing his trial counsel provided ineffective assistance, defendant contends there was no possible tactical reason for requesting that the court not instruct the jury on second degree murder, particularly after the jury asked the court whether it could convict defendant of a lesser charge. But defendant ignores the possibility that the jury could have acquitted him. The jury's question suggested it might be unwilling to convict defendant of first degree murder. Had the jury acquitted defendant, defense counsel's tactical decision would have been vindicated.

### *Sufficiency of the Evidence*

The jury returned a guilty verdict against defendant for first degree murder under section 187, subdivision (a). The jury also made two separate findings under section 190.2, subdivision (a)(17) — that defendant was (1) engaged in the commission of burglary while committing first degree murder and (2) engaged in the commission of robbery while committing first degree murder.

Defendant generally argues there is insufficient evidence in the record to support his felony murder conviction. In particular, defendant claims there is not substantial evidence showing defendant was a "major participant" in the felonies underlying the special circumstances found by the jury under section 190.2. (See *People v. Proby* (1998) 60 Cal.App.4th 922, 927 ["In order to support a finding of special circumstances murder, based on murder committed in the course of robbery, against an aider and abettor who is not the actual killer, the prosecution must show that the aider and



abettor had intent to kill or acted with reckless indifference to human life while acting as a major participant in the underlying felony”]; CALCRIM No. 703 [jury instruction for section 190.2, subd. (d), special circumstances findings for defendant guilty of first degree felony murder who is not the actual killer].)

The elements supporting a finding of felony murder special circumstances against a defendant who was not the actual killer differ from the elements necessary to convict a defendant of felony murder in the first instance. “All murder . . . which is committed in the perpetration of, or attempt to perpetrate [certain enumerated felonies including robbery and burglary] is murder in the first degree.” [Citation.] The mental state required is simply the specific intent to commit the underlying felony [citation], since only those felonies that are inherently dangerous to life or pose a significant prospect of violence are enumerated in the statute. . . . [¶] The purpose of the felony-murder rule is to deter those who commit the enumerated felonies from killing by holding them strictly responsible for any killing committed by a cofelon, whether intentional, negligent, or accidental, during the perpetration or attempted perpetration of the felony.” (*People v. Cavitt* (2004) 33 Cal.4th 187, 197; see also CALCRIM No. 540B [jury instruction for felony murder when coparticipant allegedly commits fatal act].)

Although defendant purports to challenge his felony murder conviction, his brief is actually tailored toward a challenge to the jury’s special circumstance findings. The parties’ briefs both muddle the issues by combining the question of substantial evidence for the underlying felony murder conviction and substantial evidence for special circumstance findings.

As a preliminary matter, it does not appear that the special circumstance findings had any additional effect on defendant’s sentence. Defendant was sentenced to 25 years to life, the standard sentence given to defendants convicted of first degree murder who are *not* found to have committed special circumstances. (§ 190, subd. (a); § 190.2, subd. (a) [penalty is death or life without parole if one or more special

circumstances found].) Had defendant been 16 or 17 years old, he would have been eligible for life without parole based on a finding of first degree murder with at least one special circumstance. (§ 190.5, subd. (b).) The same findings at 18 years old would have qualified defendant for death penalty consideration. (§ 190.5, subd. (a); § 190, subd. (a); § 190.2, subd. (a).) But, as a 15 year old tried as an adult, it appears the question of special circumstance findings was inconsequential to defendant's sentence. Nevertheless, we will review both defendant's conviction and the special circumstance findings for substantial evidence.

““In assessing the sufficiency of the evidence, we review the entire record in the light most favorable to the judgment to determine whether it discloses evidence that is reasonable, credible, and of solid value such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt.” [Citation.]’ [Citation.] We presume in support of the judgment the existence of every fact that could reasonably be deduced from the evidence. [Citation.] We may reverse for lack of substantial evidence only if “upon no hypothesis whatever is there sufficient substantial evidence to support” the conviction.” (*People v. Em* (2009) 171 Cal.App.4th 964, 969-970 (*Em*).)

“Defendant was charged with murder under a theory of felony murder. Defendant's liability for [Love's] murder was based on aiding and abetting the commission of or conspiring to commit robbery [and burglary]; there is no dispute that [another individual(s)] was the actual [person who actually killed Love]. To establish defendant's liability as an aider and abettor, the prosecution was required to prove defendant knew of [his friends'] unlawful purpose, and intended to and did aid, facilitate, promote, encourage, or instigate [his friends'] commission of the crime. [Citations.] Presence at the scene of a crime, alone, is insufficient to establish aiding and abetting liability. [Citation.] To establish defendant's liability as a coconspirator, the prosecution was required to prove defendant intended to and did agree with [Rivera and Pena] to commit a robbery [or burglary], defendant intended that one of them would commit the

robbery [or burglary], and one member of the conspiracy committed an overt act to accomplish the robbery [or burglary]." (*Em, supra*, 171 Cal.App.4th at p. 970.)

The testimony of Gardner detailed above, along with the physical evidence of Love's death, is substantial evidence of defendant's guilt, so long as it was supported by independent corroborating evidence. In brief, Gardner testified that he, defendant, Rivera, and Pena met at defendant's house, discussed robbing an elderly man, and walked to Love's house. Rivera and Pena, then defendant, went inside the house. Defendant was in the kitchen while he was inside and he looked through Love's drawers. After they left the house, Rivera, Pena, and defendant drove off in Love's car. Gardner's testimony provided the bulk of the detail about the events of the night of the murder.

Independent, corroborating evidence of defendant's guilt is in the record. Defendant's mother testified that defendant told her he and Gardner saw two of their friends go into an old man's house and they figured their friends were robbing the house. Defendant's mother also testified that defendant told her he and Gardner went to the side of Love's house and looked inside the window. Defendant's mother also testified defendant told her that he and Gardner "heard a moan, and it didn't sound so good as they booked out of there[.]" This evidence confirms much of Gardner's testimony. Even though defendant never entered the house in his version of events, defendant was arguably acting as an aider and abetter by his own admission (by acting as a lookout and by encouraging the actions of Rivera and Pena by accompanying them to the crime). Furthermore, by defendant's own admission, he heard a noise suggesting the victim had been seriously harmed yet he took no action to assist the victim.

There is other corroborating evidence. Officers testified that the condition of Love's living room suggested there was a struggle, as items were scattered and blood was spilled in several places. The coroner testified that in order to inflict the injuries sustained by Love, punches and kicks of maximum force would have been applied multiple times. This supports a finding defendant would have known what was

happening to Love, as it would be easy to sense the attack upon Love. In addition, the back yard sliding door was ajar when the police arrived at the Love residence, supporting the inference defendant entered and exited the house through the back door.

Love's daughter and son-in-law gave Love a box of chocolate liqueurs. The police found the box of chocolate liqueurs in Love's kitchen. Four individually wrapped chocolate liqueurs were found in the backseat of Love's car, which was found by police abandoned on a dirt road near the residence of Rivera's brother. While in custody, defendant said to a police officer, "I didn't kill anyone. I was just cruising in the back seat when Fernando shot that guy." This evidence supports a finding that defendant stole the chocolates from Love's kitchen and took the chocolates with him as he fled with Rivera and Pena in Love's car.

In short, there is substantial evidence in the record supporting defendant's felony murder conviction; the jury could have reasonably concluded he participated in the burglary or robbery of Love's home and that Love died during the burglary or robbery. The jury also could reasonably conclude defendant was a major participant in the crime and acted with reckless indifference to human life based on his participation in the underlying felonies and his continued cooperation with Rivera and Pena after observing or hearing the attack on Love.

#### *Cruel and Unusual Punishment*

Finally, defendant challenges his sentence of 25 years to life as unconstitutionally cruel and unusual due to his age (15 years old) at the time of the offense and his relative culpability for the murder of Love. Defendant specifically points out in his reply brief that "[t]he *maximum* sentence appellant could receive for the crime of first degree murder under any theory committed at the age of 15 is 25 years to life. In other words, if it had been shown appellant specifically intended to murder Love and had

brutally beaten Love to death himself, appellant still would have received the same sentence [as he received for his felony murder conviction].”

Both the United States Constitution and the California Constitution prohibit cruel and unusual punishment. “Whether a punishment is cruel or unusual is a question of law for the appellate court, but the underlying disputed facts must be viewed in the light most favorable to the judgment.” (*People v. Martinez* (1999) 76 Cal.App.4th 489, 496.)

There are some bright line substantive limits on sentences dispensed to juvenile offenders. (See, e.g., § 190.5, subd. (a) [“Notwithstanding any other provision of law, the death penalty shall not be imposed upon any person who is under the age of 18 at the time of the commission of the crime”]; *Roper v. Simmons* (2005) 543 U.S. 551, 578-579 [death penalty for juveniles is unconstitutional regardless of crime committed]; *People v. Demirdjian* (2006) 144 Cal.App.4th 10, 17 [“For juveniles under 16 who were 14 or 15 when [a special circumstance murder] was committed, a life term without possibility of parole is not permitted [under relevant California statutes], leaving a term of 25 years to life *with* possibility of parole”].)

There are also proportionality requirements inherent in the constitutional prohibitions of cruel and unusual punishment. (See, e.g., *People v. Dillon* (1983) 34 Cal.3d 441, 487-489 [courts may reduce felony murder to second degree murder if circumstances of case, including age of defendant, suggest the sentence required by a felony murder conviction is excessive and disproportionate] (*Dillon*); *In re Lynch* (1972) 8 Cal.3d 410, 424 [punishment is unconstitutional if it is “so disproportionate to the crime for which it is inflicted that it shocks the conscience and offends fundamental notions of human dignity”]; *In re Nunez* (2009) 173 Cal.App.4th 709, 714-715, 727-728 [sentence of 14 year old to life in prison without the possibility of parole for kidnapping for ransom is unconstitutional, in part because the most a 14-year-old defendant could receive for

premeditated murder with special circumstances would be life with the possibility of parole (25 years to life)].)

The question presented here is whether defendant's sentence is unconstitutional because it would be disproportionate to sentence him to the same punishment he would have received had he personally committed the murder of Love. This contention has some surface appeal, particularly in light of defendant's young age and "the dubious origins of the felony-murder doctrine, the many strictures leveled against it over the years by courts and scholars, and the legislative and judicial limitations that have increasingly circumscribed its operation [as of 1983]." (*Dillon, supra*, 34 Cal.3d at pp. 462-463 [also deeming felony-murder rule a "highly artificial concept" which 'deserves no extension beyond its required application'].)

But the trial court in this case, unlike its counterpart in *Dillon* (which attempted to reduce the defendant's sentence by committing him to the Youth Authority), did not exercise its discretion to reduce defendant's punishment. As the court explained in denying defendant's *Dillon* motion, the evidence suggested defendant voluntarily followed Rivera and Pena to an elderly man's house with knowledge of what they intended to do, participated in the burglary, did not assist the victim (either during or after the crime) despite being nearby when Love was beaten to death, and joined Rivera and Pena in Love's automobile after leaving the house. We see no basis to disagree with the trial court's view of the evidence or find error in the court's application of *Dillon*.

And, putting aside the particular facts of this case, courts since *Dillon* have rejected arguments that sentencing a juvenile to a life term with the possibility of parole based on felony murder is per se unconstitutional. (*Em, supra*, 171 Cal.App.4th at pp. 966-967, 972-973 [affirming 15 year old's sentence of 50 years to life for felony murder and weapons enhancement; "[l]ife sentences pass constitutional muster for those convicted of aiding and abetting murder, and for those guilty of felony murder who did not intend to kill"]; *People v. Ortiz* (1997) 57 Cal.App.4th 480, 486-487 [affirming 26-

year-to-life sentence against 14-year-old accomplice to felony murder].) Even the dissenting opinion in *Em*, authored by Justice Moore, stated a reduction of the sentence to two, *concurrent* 25 years to life sentences would have been constitutionally acceptable. (*Em, supra*, 171 Cal.App.4th at p. 978 (conc. & dis. opn., Moore, J.) ["At the time of the murder, defendant was 15. He was passively involved and immature. Two sentences of 25 years to life, running concurrently instead of consecutively, would withstand scrutiny"].) Defendant's sentence does not amount to the imposition of cruel and unusual punishment.

#### DISPOSITION

The judgment is affirmed.

IKOLA, J.

WE CONCUR:

RYLAARSDAM, ACTING P. J.

O'LEARY, J.

G040331

The People v. Khalifa

Superior Court of Riverside County

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FILED  
SUPERIOR COURT OF CALIFORNIA  
COUNTY OF RIVERSIDE

DEC 21 2007

*W. Rogers*

ORIGINAL  
SUPERIOR COURT OF CALIFORNIA  
COUNTY OF RIVERSIDE  
(Southwest Justice Center)

14 THE PEOPLE OF THE STATE OF CALIFORNIA,

16 Plaintiff,

18 v.

20 SHAWN MALONE KHALIFA,

24 Defendants.

NO. SWF006720

PEOPLE'S OPPOSITION TO  
DEFENDANT KHALIFA'S  
MOTION TO REDUCE HIS  
CONVICTION FROM 1<sup>ST</sup>  
DEGREE MURDER TO 2<sup>ND</sup>  
DEGREE MURDER.

(Hg: 12/21/07 S-304 8:30 a.m.)

25 **FACTS PERTAINING TO THE CRIMES**

26 On the evening of January 27, 2004, Fernando Rivera, Juan Pena, Shawn Khalifa and Mark  
27 Gardner met at Shawn Khalifa's home. They agreed to go to 77 year old Hubert Love's house and  
28 rob him. The four lived in Love's neighborhood and walked over to his house together. Upon  
29 arriving at the house, Rivera and Pena went to the front door of the residence and ultimately made  
30 their way into Love's home. Khalifa and Gardner initially stayed in the front of the house acting as  
31 look-outs.

32 Eventually Khalifa and Gardner went through a side gate and walked toward the back end of  
33 the house. Gardner remained at the side gate while Khalifa entered the residence through a back  
34 sliding glass door. Inside the kitchen Khalifa rifled through kitchen drawers looking for property to  
35 steal. As this was occurring, Rivera and Pena were savagely beating Love to death as Khalifa was  
36 stealing Love's property.

1 Khalifa and Gardner fled the home through the side gate and went toward Gardner's  
2 residence. Rivera and Pena took Love's car keys and drove away in Love's white Honda Accord.  
3 Rivera drove up to Gardner's residence where Khalifa gladly jumped into the backseat of the car,  
4 while Gardner stayed behind. Rivera, Pena and Khalifa drove up to the nearby Haz-It market where  
5 Rivera and Pena argued over a gun Pena stole from Love. Rivera then shot Pena in the head and  
6 chest. Khalifa remained in Mr. Love's stolen car and drove with him to dump the recently murdered  
7 Pena. Khalifa helped Rivera throw Pena's bleeding body in a nearby drainage canal.

8 Rivera and Khalifa then abandoned Love's white Accord at dirt road adjacent to Rivera's  
9 brother's home. Khalifa later told Gardner that he shot Pena twice as well.

10 **POINTS AND AUTHORITIES**

11 **I**

12 **THE COURT SHOULD NOT REDUCE THE FIRST DEGREE MURDER**

13 **VERDICT TO MANSLAUGHTER**

14 The defendant was convicted after a full and fair trial of first degree murder a violation of  
15 Penal Code section 187(a) and two special circumstances under Penal Code section 190.2(a)(17)(A)  
16 & (G). Penal Code §190.2(a) provides that the punishment for murder in the first degree where a  
17 special circumstance has been found shall be death or life without the possibility of parole.

18 When a convicted murder is under eighteen years of age, different punishment applies. Penal  
19 Code §190.5 states in pertinent part:

20  
21 "(a) Notwithstanding any other provision of law, the death penalty shall not be  
22 imposed upon any person who is under the age of 18 at the time of the commission of the  
23 crime."

24 "(b) The penalty for a defendant found guilty of murder in the first degree in any case  
25 in which one or more special circumstances enumerated in Section 190.2 or 190.25 has been  
26 found to be true under Section 190.4, who was 16 years or older and under the age of 18  
27 years at the time of the commission of the crime, shall be confinement in the state prison for  
28 life without the possibility of parole or, at the discretion of the court, 25 years to life."

29 ///

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1 Where, as is the case is here, a convicted first degree murderer was under the age of 16 at the  
2 time of the commission of the offense, the punishment is established in Penal Code §190. The  
3 maximum punishment the defendant may receive is 25 years to life in prison. Penal Code §190 set's  
4 forth the sentencing scheme for first degree murder and states in pertinent part:

5  
6 Every person guilty of murder in the first degree shall be punished  
7 by death, imprisonment in the state prison for life without the  
8 possibility of parole, or imprisonment in the state prison for at term  
9 of 25 years to life.

10 Relying on People v. Dillon (1983) 34 Cal.3d 441, the defendant contends in his moving  
11 papers that the Court should reduce his murder conviction from first degree murder with special  
12 circumstances to second degree. However, this Court should decline to reduce the defendant's first  
13 degree murder conviction to manslaughter because the prescribed punishment of 25 years to life is  
14 not grossly disproportionate to the offense committed or to the culpability of the defendant. Further  
15 the defendant's primary basis for the requested reduction is his age at the time of the commission.  
16 **However, as noted above, the statutory sentencing scheme already takes into consideration the**  
17 **defendant's age in drastically reducing the punishment for the horrendous crimes which he**  
18 **committed.** Had the defendant been eighteen years or older at the time of his crimes, he would have  
19 been sentence either to death or life without the possibility of parole.

20 **A. The Facts of Dillon**

21 In Dillon, the defendant was a 17 year old high school student. The defendant and several  
22 boys his age sought to steal marijuana from a nearby field. On their first try, the boys were  
23 discovered by the fields' owner and were sent away at the point of a shotgun with threats they would  
24 be shot if they returned. When the boys met for the second attempt, several of them, including the  
25 defendant, were armed.

26 The boys spread out in the field. Upon seeing the brother of the owner, the boys halted their  
27 progress and hid for about two hours. During that period, two boys left, and two more were pursued  
28 by dogs but returned. The defendant and a few others watched from just outside the field.

29 One of the boys, apparently not visible to the group with the defendant, accidentally  
30 discharged his shotgun twice. The defendant believed these shots indicated that his friends were  
31 being shot and killed. At about the same time the owner, who was carrying a shotgun, had circled  
32 around the defendant's group and was approaching. The defendant saw the owner and was sure the  
33 owner had seen him. As the owner approached, he shifted his shotgun so that it pointed in the

34 ///  
35 ///  
36 ///

1 defendant's direction. The defendant was afraid of being shot and then lowered his .22 caliber rifle  
2 to his waist and began firing. When the owner fell, the defendant stopped firing. The owner was hit  
3 nine times and killed. People v. Dejesus (1995) 38 Cal.App.4<sup>th</sup> 1, pp. 27-28. (Summarizing the facts  
4 in *Dillon*)

5 **B. The Ruling in Dillon**

6 The jury convicted *Dillon* of attempted robbery and convicted him of first degree murder  
7 under the felony-murder rule. The Supreme Court affirmed the judgment on the attempted robbery  
8 and modified the conviction of first degree murder to second degree murder. Although the felony  
9 murder doctrine was statutory and could not be judicially modified, the Court concluded the penalty  
10 was, nevertheless, governed by constitutional limitations barring cruel and unusual punishment, and  
11 that punishment could be considered constitutionally infirm if it was inflicted by a cruel and unusual  
12 method or if it was "grossly disproportionate to the offense for which it was imposed." (People v.  
13 Dillon (1983) 34 Cal.3d at pp. 477-478.)

14 In order to determine whether the prohibition against cruel and unusual punishment is  
15 involved in such cases, the California Supreme Court in *Dillon* adopted the rule in People v. Lynch  
16 (1972) 8 Cal.3d 410, that a statutory punishment may violate the constitutional prohibition not only  
17 if it is inflicted by a cruel or usual method, but also if it is grossly disproportionate to the offense for  
18 which it is imposed." (People v. Dillon, supra, 34 Cal.3d at p. 478.)

19 The techniques identified in People v. Lynch (1972) 8 Cal.3d 410, 425-429, to aid in  
20 determining proportionality call first for an examination of "the nature of the offense and/or the  
21 offender, with particular regard to the degree of danger both present to society." (Id., at p. 435.)

22 However, *Dillon's* application of a proportionality analysis to reduce a first degree murder  
23 conviction must be viewed as representing an exception rather than a general rule. The *Dillon*  
24 majority on this point itself recognized the exceptional nature of its result. People v. Munoz (1984)  
25 157 Cal.App.3d at p.1015.

26 **C. The Nature of This Offense**

27 In *Dillon*, first degree murder occurred through actions that were non-spontaneous and  
28 entirely defensive in nature. In *Dillon*, the defendant never showed any callous disregard for  
29 human life.

30 In the present case the defendant acted in a premeditated manner in which the jury found  
31 that the defendant "acted with reckless indifference for human life." This was evident by the  
32 nature in which both the murder and the connected burglary and robberies were carried out. The  
33 defendant walked from his home over to Mr. Love's house, knowing the entire time that Mr. Love  
34 was most assuredly to be murdered inside of his home. The defendant knew that Rivera and Pena  
35 approached the front door with anticipation that they would beat Mr. Love to death. The defendant  
36 directed Mark Gardner during the course of the murder taking some role of leadership.

1 Contemporaneous with the savage murder of Mr. Love the defendant proved himself void  
2 of compassion by entering the home to steal Mr. Love's possessions as Mr. Love lay gasping for  
3 his last breaths. Knowing that Mr. Love had been savagely beaten the defendant gladly jumped  
4 into the back of his recently stolen car for a joy ride. The defendant showed no reflection or  
5 remorse for his actions as he relished in the spoils of his criminal acts.

6 When Rivera murdered Pena the defendant participated in the disposal of Pena's bleeding  
7 body. Rather than show regret for his actions, the defendant took them as a badge of honor and  
8 falsely boasted to Gardner that he shot Rivera as well. There is nothing about the defendant  
9 horrendous murderous acts that are remotely similar to those in Dillon.

10  
11 **D. The Nature of the Offender**

12 While the defendant is fifteen, he has not a clean history. The defendant committed a group  
13 theft of alcohol approximately 6 months prior. The theft resulted in the defendant and his criminal  
14 allies tackling a store employee to the ground.

15 The defendant was on probation at the time of the offense. A probation that he disregarded  
16 at will, by going out at night knowingly in violation of his curfew.

17 At the time of the murder the defendant was making little contribution to society and his  
18 own life. The defendant remained home in the day under the fraud that he was home schooling  
19 himself. Rather than obtaining an education and/or working the defendant was spending his days  
20 idle, "kicking it." These idle days amounted to drinking beer and smoking marijuana and playing  
21 video games.

22 In essence, by bringing this motion, the defendant wants the Court to override the jury's  
23 verdict and re-litigate the case on the merits. The defendant invites the Court to supplant the  
24 defendant's theory of the case with the jury's verdict. However, in this case, the jury has already  
25 carefully considered and rejected the defense theories. This Court should not disturb the jury verdict  
26 without compelling reason. The Supreme Court cautioned against disturbing a jury verdict: "It is,  
27 however, guided by a presumption in favor of the correctness of the verdict and proceedings  
28 supporting it. People v. Martin (1970) 2 Cal.3d 822, 832. The trial Court "should [not] disregard  
29 the verdict ... but instead ... should consider the proper weight to be accorded to the evidence and  
30 then decide whether or not, in its opinion, there is sufficient credible evidence to support the  
31 verdict." (*Id.*)

32 Ample evidence supports the first degree murder verdict and special circumstances findings,  
33 while there is no compelling evidence to persuade this Court to override the jury's verdict and  
34 reduce the sentence to second degree murder. Moreover, the totality of the circumstances  
35 surrounding the defendant's commission of the crime does not demonstrate that punishment for first  
36 degree murder is grossly disproportionate to the defendant's individual culpability.

1 **D. Recent Case Law Supports Denying the Defendant's Motion**

2 In *People v. Smith* (2005) 135 Cal. App.4<sup>th</sup> 914, the defendant was convicted of first degree  
3 murder with the special circumstance of murder in the commission of a robbery. In *Smith*, the  
4 evidence suggested that the appellant stood outside a hotel room while his accomplices robbed the  
5 victim and then stabbed her to death when a struggle ensued. (*Id.* at 927.) The court upheld the  
6 maximum allowable punishment of life without the possibility of parole for the defendant's lesser  
7 involvement finding that such actions constituted a reckless indifference to human life. (*Id.* at 927-  
8 929.) The court has also recently upheld the maximum punishment of the death penalty for a  
9 felony murder in *People v. Pollock* (2004) 32 Cal.4<sup>th</sup> 1153.

10 **CONCLUSION**

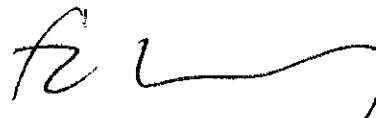
11 For the above reasons, the People respectfully request the court deny the defense's motion to  
12 reduce Shawn M. Khalifa's conviction from first degree murder to second degree murder.

13 Dated: December 20, 2007

14  
15 Respectfully submitted,

16  
17 ROD PACHECO

18 District Attorney

19  
20  for QRB

21  
22 QUINN R. BARANSKI

23 Deputy District Attorney  
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**RECEIVED**  
DEC 13 2007

Riverside County  
District Attorney  
Reception

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COUNTY OF RIVERSIDE

DEC 13 2007

8 SUPERIOR COURT OF THE STATE OF CALIFORNIA  
9 COUNTY OF RIVERSIDE

10 PEOPLE OF THE STATE OF  
11 CALIFORNIA

Plaintiff,

12 -vs-

13 SHAWN MALONE KHALIFA,

14 Defendants.

CASE NO. SWF 006720

SENTENCING MEMORANDUM;  
DILLON MOTION RE: CRUEL AND  
UNUSUAL PUNISHMENT; POINTS  
AND AUTHORITIES IN SUPPORT

Date: 12-21-07  
Time: 8:30 am  
Dept.: S-304

16 TO: DISTRICT ATTORNEY FOR THE COUNTY OF RIVERSIDE AND /OR HIS  
17 REPRESENTATIVES:

18 SHAWN MALONE KHALIFA hereby submits this sentencing memorandum and  
19 "Dillon" motion in support of his request that he be sentenced to a term less than 25 years  
20 to life in prison.


21 Said Motion will be made on the grounds that the Court should exercise its discretion  
22 and grant a reduction of the first degree felony-murder to second degree murder. Defendant  
23 contends that the imposition of a sentence of 25 years to life would violate the California  
24 constitutional prohibition against cruel and unusual punishment, Article I Section 17 and the  
25 8<sup>th</sup> Amendment of the United States Constitution.  
26

27  
28 Sentencing Memorandum / Dillon Motion

1 Said motion will be made and based on this Notice, pleadings, all papers, documents  
2 and records in this case and on file herein, and such oral and further evidence, either oral or  
3 written, as might be adduced at the time of said hearing.

4 Respectfully submitted,

5  
6  
7 DATED: 12-10-07

  
AMADOR L. CORONA  
Attorney for Defendant  
Shawn Malone Khalifa



1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **1. STATEMENT OF THE CASE**

3 Shawn Khalifa stands convicted of murder in the first degree as well as the special  
4 circumstances of murder in the commission of a robbery and burglary. Penal Code section  
5 190.5 subdivision (b) provides that the penalty for a defendant who was 16 years of age or  
6 older and under the age of 18 shall be confinement in the state prison for life without the  
7 possibility of parole of 25 years to life. The offense occurred on January 27, 2004. Shawn  
8 was born on 11-16-88. Thus he was only 15 years old at the time of the offense. Therefore,  
9 the maximum penalty for a 15 year old is 25 years to life. Under this statute a 15 year old  
10 may not be sentenced to life without the possibility of parole.

11 **2. SHAWN KHALIFA'S PART IN THE CRIME**

12 Based upon the evidence presented at trial and the prosecutions theory of the case,  
13 Shawn Khalifa's participation can best be characterized as an aider and abetter in the crime  
14 of burglary and robbery. In addition, there was some evidence that Shawn may have entered  
15 the Love residence through the rear patio door and taken some candy from the kitchen.

16 The prosecution presented evidence that the plan to rob Mr. Love was initiated by  
17 Juan Pena and Fernando Rivera. Shawn Khalifa and Mark Gardner followed Pena and Rivera  
18 and acted as lookouts. Unfortunately, during the course of the burglary and robbery, Mr.  
19 Love's life was taken.

20 There is no evidence that Shawn Khalifa had any physical contact with Mr. Love. In  
21 addition, there is no evidence that Shawn knew or anticipated that Mr. Love would be beaten  
22 to death by Juan Pena and Fernando Rivera.

23 **I**

24 **THE COURT HAS DISCRETION REDUCE THE CONVICTION**  
25 **TO SECOND DEGREE MURDER**

26 The seminal case of People v. Dillon (1983) 34 Cal. 3d 441 initiated its analysis of  
27

1 the cruel and unusual punishment issue by first noting that the punishment for felony murder  
2 during the commission of such crimes as burglary and robbery carry with it the identical  
3 punishment inflicted for deliberate and premeditated murder with malice aforethought (i.e.  
4 the most aggravated form of homicide known to our law). The court stated that "in some first  
5 degree felony-murder cases this Procrustean penalty may violate the prohibition of the  
6 California Constitution against cruel and unusual punishment", at p. 478. The *Dillon* court  
7 reiterated the rule adopted in *In re Lynch* (8 Cal. 3d 410), that a punishment may violate the  
8 California constitutional prohibition against cruel and unusual punishment if it is so  
9 disproportionate to the crime for which it is inflicted that it shocks the conscience and  
10 offends fundamental notions of dignity. Some of the techniques that the court suggests to  
11 employ are:

- 12 1. The nature of the offense,
- 13 2. The nature of the defendant,
- 14 3. The degree of danger the offense and the defendant present to society.

15 **A. The Nature of the Offense:**

16 The courts are to consider the offense not only in the abstract, but also the particular  
17 facts of the crime before the court. The courts are to consider factors such as motive, the way  
18 the crime was committed, the extent of the defendant's involvement and the consequences  
19 of the act.

20 The evidence presented indicates that Shawn Khalifa acted as a lookout during the  
21 burglary/robbery and perhaps even participated in the burglary by taking candy from the  
22 kitchen of the Love residence.

23 Mr. Love was killed in a brutal fashion however the killing was carried out by Pena  
24 and Rivera. There is no evidence that Shawn Khalifa knew that the killing was to occur.

25 **B. The Nature of the Defendant:**

26 The court is to focus on the Defendant. Such factors as the defendant's culpability,  
27

1 age, criminal record, personal characteristics and state of mind are all important factors in  
2 this analysis.

3 Thus the focus must be on Shawn Khalifa's role in the burglary/robbery and not on  
4 the conduct of Juan Pena and Fernando Rivera (the actual killers). Shawn's culpability is  
5 different from that of Pena and Rivera because Shawn never killed nor intended to kill Mr.  
6 Love.

7 Shawn Khalifa was only 15 years of age at the time of the offense. His juvenile record  
8 consisted of running out of Albertson's with a bottle of liquor.

9 Dr. Tasha Arneson, the Juvenile Hall Mental Health Psychologist submitted a very  
10 telling statement to Probation. Shawn was in Juvenile Hall custody for three years during  
11 which Dr. Arneson had the opportunity to observe and treat him. She noted that Shawn was  
12 an extremely anxious kid with a lot of obsessive compulsive characteristics. Shawn  
13 participated in classes related to aggression, moral reasoning and social skills. Shawn took  
14 on a position of leadership and became a peer mentor and taught these skills that he learned  
15 to minors that were assigned to him. Shawn would frequently stand up for the underdog and  
16 make sure that kids were not picked on by others. The minors referred to Shawn as the  
17 stabilizer of the unit. Shawn was well liked and trusted by his peers.

18 During the course of deliberations the jurors submitted a note to the court asking if  
19 Shawn Khalifa could be convicted of something less than first degree felony murder. Due  
20 to a tactical decision (i.e. decision not to request a second degree murder instruction) made  
21 by counsel for Shawn Khalifa, the court had no choice but to answer that there was no option  
22 other than first degree felony murder. Coincidentally, the jury in *Dillon* made a similar  
23 inquiry during deliberations.

24 Shawn Khalifa is not the prototype of a hardened criminal who poses a grave threat  
25 to society. In fact his exemplary conduct while in juvenile hall suggests that he is  
26 compassionate and has the ability to be a positive influence on others.

1 **C. The Degree of Danger the Offense and the Defendant Present to Society**


2 Shawn Khalifa is not a murderer in the traditional understanding of the crime of  
3 murder. He has been caught in the web of the felony murder rule which flies in the face of  
4 traditional notions of personal accountability and proportionate punishment.

5  
6 **CONCLUSION**

7 Based upon all of the aforementioned factors, this court is asked to exercise its  
8 discretion and reduce the punishment to second degree murder, namely 15 years to life. .

9 Respectfully submitted,

10  
11 DATED: 12-18-07

12   
13 AMADOR L. CORONA  
14 Attorney for Defendant  
15 Shawn Khalifa  
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1 **PROOF OF SERVICE**

2  
3 STATE OF CALIFORNIA )  
4 COUNTY OF RIVERSIDE)

5 I am employed in the County of Riverside, State of California. I am over the age of  
6 18 and not a party to the within action. My business address is 121 E. Fourth Street, Suite  
C, Corona, CA 92879-1406.

7 On December 13, 2007, I served the foregoing document described as:

8 **SENTENCING MEMORANDUM; DILLON MOTION RE: CRUEL**  
9 **AND UNUSUAL PUNISHMENT; POINTS AND AUTHORITIES IN**  
10 **SUPPORT**

11 X By Delivering or causing a true copy to be delivered to the ( ) offices of the  
addressee(s); and/or (X) the addressee personally:

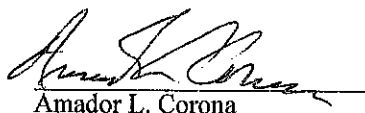
12  
13 ATTN: QUINN R. BARANSKI, Deputy District Attorney  
14 Riverside County District Attorney  
4075 Main Street, 1<sup>st</sup> Floor  
Riverside, CA 92501

15 **AND**

16 \_\_\_\_\_ By placing ( ) the original ( ) a true copy of the original enclosed in a  
17 sealed envelope addressed as follows:

18  
19  
20 I declare under penalty of perjury under the laws of the State of California that the  
21 above is true and correct.

22 Executed this 13 day of December, 2007 at Corona, California.

23  
24   
25 Amador L. Corona

26  
27 PROOF.KHALIFA.WPD  
28

12/21 5304

SWF006700 #2

DEC 12 2007

*Janet Beger*  
1109 Marston St  
West Sacramento CA 95605  
916-371-7476  
Janetberger13@aol.com

RECEIVED  
SUPERIOR COURT OF CALIFORNIA  
COUNTY OF RIVERSIDE

December 5, 2007

DEC 12 2007

Honorable Judge Judith Clarke  
30755-A Auld Rd  
Murrieta, CA 92563

*mb*

Honorable Judge Judith Clarke,

I am writing to beg for mercy for Shawn Malone Khalifa. My son was convicted on the murder felony rule and he killed no one. Since my son has been in Prison and was sentenced to life without the possibility of parole he has been approached by other inmates telling him he has to stab an inmate or he will be stabbed, he came to the visiting room and told me about it and all he could do is cry and say mom what am I going to do I said I guess you will get stabbed, and he said I guess so he said mom I can't hurt anyone and I said I know son. Monday morning I contacted the prison where my son is housed and told them what was going to happen without my son knowing what I did and they moved the man he was suppose to stab. He came to the visiting room the next week end and said guess what mom I prayed all night asking for god's help and the man I was suppose to stab was moved "God answered my prayers" I did not tell my son but I answered his prayers. This happen the first three weeks he entered the prison all because has life without. Then after that the guards treated my son with disrespect and they treated him like he was going to stab someone and he would have never hurt anyone. He has seen inmates killed by there cellies, I could go on about how bad the prison system is and how the murder felony rule is unconstitutional and for anyone to endure what my son endures daily is ludicrous. When I think Shawn could go through the same thing my son has been going through it saddens me this boy killed no one and never could kill anyone. California's felony murder rule allows ambitious prosecutors to sweep up everyone and charge even those who had nothing to do with a murder, as if they were guilty. This "legal fiction" allows people, like Shawn, who was in the wrong place at the wrong time, to find themselves charged with a murder committed by another, and to be sentenced to life in prison without possibility of parole. The felony murder rule, long since abandoned by England where it began, has been abused by prosecutors in the few states, like California, where it still exists.

Please I beg you to save Shawn's life. Not only will Shawn go to prison but so will his

*entire family. Shawn can not control the actions of another and should not be punished for it. There is no justice in sentencing a man for murder when he killed no one. Please take some time to explore other ways to help Shawn not take his young life away. Thank you in advance.*

*Sincerely,*

A handwritten signature in black ink, appearing to be 'J. B.' with a long, sweeping horizontal line extending to the right.

*Signature*

Gene + Berger  
1109 Mansdon St  
West Sacramento, CA  
95605

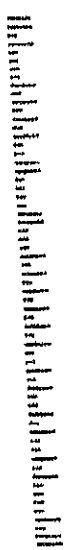
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Honorable Judge Judith Clarke  
~~30755 - Auld Rd~~  
Morristh, CA. 92563

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11/16 5774  
OCT 29 2007

Saturday  
October, 20<sup>th</sup>  
2007  
5:28 P.M.

SWF006770 #2

RECEIVED  
SUPERIOR COURT OF CALIFORNIA  
COUNTY OF RIVERSIDE

OCT 29 2007

Dear, Honorable Judge, Judith Clark

①

Ma'am, I write to you with all due respect today, in regards to my sentencing hearing.

I understand that I have been convicted of the 'Felony Murder Rule'. Because I have been convicted, I do not think it would be proper to protest my innocence, in this letter. Ma'am, I would like to request that you may consider a more lenient sentence, if possible, then 25 years to life in state prison?

I am not a murderer, and I have never been a murderer. If I would have known that Fernando was capable of murder, I would have never associated with him. I think that it was unbelievably horrible as to what he did. I know that the victim's family probably thinks that I am a monster, but I am not. I pray that they may find peace with me, in knowing that I did not kill Mr. Love, and peace in knowing that the person who did kill Mr. Love, has pled guilty to doing so.

As you are most likely aware of, I have spent 3 years in juvenile hall, before being transferred to the adult jail. Being in juvenile hall, changed my life. When I was charged with the store theft, I was given probation. I never spent any time in juvenile hall for that. I was charged with this case January's, 31, 2004. After being in juvenile hall for a

②

year I pled guilty to the theft, never being informed that I would be given a juvenile felony. This is my first time ever being in jail. While I was in juvenile hall, I earned my high school diploma, I worked as a peer mentor under the psychologist, and I participated in the "J.i.i." program. I do not remember what J.i.i. stands for, but I think the first two letters stand for juvenile intervention.

The J.i.i. program is for kids that are locked up, to talk to kids that are on there way to being locked up, if they don't change their life around. I also completed an anger management class and received a certificate of completion.

My mom moved from Perris, to San Juan Capistrano, so I would not have to go back to the same place that I came from. I plan on going to Saddleback Community College in Mission Viejo if I were to be released.

The reason I write this letter to you, is because I know I will forget what I want to tell you at sentencing.

If there is anyway you can sentence me to juvenile life, in the, California Youth Authority. (C.Y.A.) Then I would like to ask that you may, please do that, because of the rehabilitation that I would receive there? I would like to request that you may please sentence me, to anything at your own discretion, that does not involve life in

③

prison, if possible?

I would like to thank you for being very fair to both parties in this matter, and thank you very much for reading this letter! Thank you!

Sincerely,

Shawn Malone Khalifa

I left one thing out, sorry!

While I was in juvenile hall I have never been assaulted, but in the county jail I have been assaulted 3 times. once by a 40 year old man that hit me in the back of my head, and another time on April 4, 2007 by Fernando Revara and one of his friends.

Shawn Malone, Khalifa  
Tracking Number 200405119—  
30755-P, Auld Rd  
MURRIETA, CA. 92563

Southwest  
Center

22 OCT 2007 PM 4 T

DEPTEN + FROM BERNARDINO CA 924

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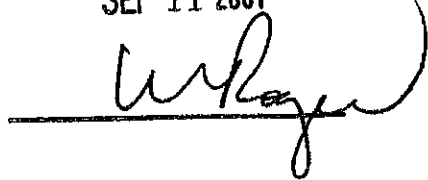
Southwest  
Justice  
Center

Honorable Judge  
Judith Clark  
30755-A Auld Rd  
MURRIETA, CA. 92563

1 ROD PACHECO  
2 District Attorney  
3 County of Riverside  
4 30755-D Auld Road, Suite 3221  
5 Murrieta, CA 92563  
6 Telephone: (951) 304-5400  
7 State Bar No.: 112432  
8

FILED  
SUPERIOR COURT OF CALIFORNIA  
COUNTY OF RIVERSIDE

SEP 11 2007



9 SUPERIOR COURT OF CALIFORNIA  
10 COUNTY OF RIVERSIDE  
11 (Southwest)  
12

13 THE PEOPLE OF THE STATE OF CALIFORNIA,  
14

15 Plaintiff,

16 v.  
17

18 FERNANDO GIL RIVERA,  
19 SHAWN MALONE KHALIFA,  
20 MARK ANTHONY GARDNER, JR.

21 Defendants.

NO. SWF006720

PEOPLE'S TRIAL BRIEF  
AND MOTIONS IN  
LIMINE #2

(Hg: 9-11-07, 8:30 a.m., S-304)

22 I

23 INTRODUCTION

24 The People submit this trial brief and motions in limine on the following issues: (A)  
25 Confirming the admissibility of evidence of Hubert Love's murder to show the motive, intent,  
26 knowledge, absence of mistake or accident, lack of self-defense and common plan and scheme of  
27 Fernando Rivera in the murder of Juan Pena under EC 1101(b); (B) Confirming the admissibility of  
28 evidence of Juan Pena's murder to show the motive, intent, knowledge, absence of mistake or  
29 accident and common plan and scheme of Shawn Khalifa in the murder of Hubert Love under EC  
30 1101(b); (C) Confirming the admissibility of evidence of Shawn Khalifa's June 8, 2003, burglary at  
31 Albertson's, on 2560 North Perris Blvd., Perris, to show the motive, intent, knowledge, absence of  
32 mistake or accident and common plan and scheme of Shawn Khalifa in the murder of Hubert Love  
33 under EC 1101(b).

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II

STATEMENT OF FACTS

On January 27, 2004, Fernando Rivera, Shawn Khalifa and Mark Gardner were collectively responsible for murdering two people on two closely related crimes. The victims were Hubert Love and Juan Pena. Rivera, Khalifa, Gardner and Pena were all neighborhood friends. Hubert Love was a 77 year old gentleman who unfortunately lived in the same neighborhood.

Early in the evening of January 27, 2004, the three defendants and Juan Pena agreed to rob Love in his home. Defendant Rivera instigated the plan to rob and ultimately murder Love in his own home. Rivera first suggested the plan by stating that he needed money and that the four criminals "should rob someone."

The four walked to Love's house together. Rivera and Pena immediately entered the house. Khalifa and Gardner initially remained on the outside driveway acting as look-outs.

After a short time Khalifa and Gardner walked into a side yard through a side gate. Khalifa soon entered through a kitchen door. Gardner stayed outside of the house acting as a look-out and watching through the kitchen window. The outside activities of the murders were witnessed by Ivan and Erik Castillo, who testified at the preliminary hearing.

During the course of the robbery, Rivera and Pena savagely tortured and beat Love to death on his living room floor. Love had severe bruising to his face and entire body. His eyes were black and blue and swollen shut. Love's left eye was hemorrhaging. The savages had broken Mr. Love's neck and hyoid bone. Mr. Love had enormous hemorrhaging to his neck and back. The cause of Mr. Love's death was declared multiple blunt force injury.

After several minutes beating Mr. Love to death, the murderers ran from his home. They saw Rivera and Pena steal Love's car and drive it away. At this stage no one knew of Love's death and the police were not contacted. The murderers left Mr. Love to bleed to death on his living room floor.

Rivera and Pena took Love's car keys and stole his white Honda that had been parked in the driveway. Down the street they picked up Khalifa. Gardner declined to get in the car. Rivera, Pena and Khalifa drove to a nearby drainage canal by the intersection of Murrieta and Mildred Street in Perris. At the drainage canal, Rivera and Pena argued over Pena taking a gun from Mr. Love. Rivera pulled out a gun and shot Pena five times, including three shots to the head.

On January 28, 2004, co-assailant Pena was found dead in a drainage canal near the intersection of Murrieta and Mildred Street in Perris. At Pena's autopsy, it was determined that several close range gun shot wounds to the head and face caused his death.

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1 On January 29, 2004, homicide investigators found Love's white Honda abandoned in a rural  
2 area above the city of Perris. Blood splatter and void patterns showed that Pena was in the front  
3 passenger seat at the time he was shot. Further blood splatter and void patterns suggested that  
4 another person was sitting in the rear passenger seat.

5 After discovering the car, detectives determined Love's address to be 505 Barca Creek in the  
6 City of Perris. Detectives found Love's beaten and bloodied body on the living room floor.

7 On February 1, 2004, Gardner agreed to be interviewed by Riverside County homicide  
8 detectives. Gardner admitted to meeting Rivera, Khalifa, and Juan Pena at Khalifa's house on the  
9 evening of January 27, 2004. Gardner stated that Rivera suggested they "do a lick" (a robbery) and  
10 recommended "the old man's [Love's] house," as a place they could get money. Gardner saw  
11 Rivera in possession of a .380 at the time they planned the crime. (A .380 casing was found near  
12 Pena's body.)

13 Gardner admitted that the four went to Love's home with Rivera telling Gardner to wait  
14 outside as a "lookout." Gardner saw Rivera and Pena go to Love's front door and saw Khalifa go  
15 into the backyard. Gardner said that he could hear Rivera yelling at Khalifa and Pena to "shut up"  
16 while those three were inside of Love's home.

17 About five minutes later Pena and Rivera ran out of the victim's house and jumped into  
18 Love's white car in the driveway. Gardner met up with Khalifa, who had run from the backyard.  
19 With Pena in the front passenger seat, Rivera drove up to Khalifa and Gardner. Rivera told them to  
20 get in, but Gardner refused. Khalifa got into the left rear seat behind the driver's seat and those three  
21 drove off in the white car.

22 The next morning, Gardner spoke to Khalifa about what had happened after Khalifa drove  
23 off with Rivera and Pena. Khalifa said that as they were driving away, Rivera and Pena got into an  
24 argument about a gun that Pena was holding and had stolen from Love earlier. Pena had not told  
25 Rivera about the gun. Khalifa said that Rivera then told Pena to change the channel on the radio and  
26 while Pena was distracted, Rivera shot Pena five times. Khalifa said Rivera then drove Pena's body  
27 to the canal and dumped it there. Khalifa told Gardner that Rivera then gave Khalifa the murder  
28 weapon. Khalifa also told Gardner that he had seen Rivera and Pena beat up the old man.

29 Khalifa was interviewed by homicide detectives on January 30, 2004. Khalifa admitted the  
30 four criminals planned to rob Love on January 27, 2004. Khalifa claimed that he and Gardner  
31 remained outside as "lookouts." Khalifa stated that at one point he looked through the back window  
32 to see Rivera and Pena confronting Love. Khalifa denied that he got into the Honda and drove off  
33 with Rivera and Pena.

34 Rivera was interviewed by homicide detectives on January 31, 2004. Rivera admitted the  
35 four criminals planned to rob Love on January 27, 2004. Rivera admitted that he and Pena went to  
36 the front door and contacted Love. Rivera said that as they entered Love's house, Pena confronted

1 Love with a gun. Love then started to fight with Pena. Rivera admitted that he had kicked the  
2 victim three times in the stomach while asking Love where his money was.

3 Rivera stated that he and Pena stole Love's Honda and drove away. Rivera said that neither  
4 Khalifa nor Gardner got into the Honda.

5 Rivera lied to the police about Pena's murder. He told an incredible story about him and  
6 Pena getting into a road rage incident with a black male. Allegedly, a black male reached through  
7 the driver's side window of the Honda and shot Pena, who was seated in the right front passenger  
8 seat and was in possession of a gun. The black male allegedly got into the back seat, held a gun to  
9 Rivera's head, and made him drive to the location of the body dump. The black male then forced  
10 Rivera to drive the Honda to the remote location where it was abandoned. The "black male" told  
11 Rivera to wait in the car for twenty minutes while he walked away.

### 12 III

### 13 POINTS AND AUTHORITIES.

#### 14 15 1. Evidence Code section 1101(b) Permits Introduction of Evidence of Other Crimes to 16 Prove Disputed Material Facts.

17 Under Evidence Code section 1101(b), evidence that a person committed a crime or other act  
18 is admissible when relevant to prove some fact (such as motive, opportunity, intent, preparation,  
19 plan, knowledge, identity, absence of mistake or accident . . . ) other than his or her disposition to  
20 commit such act. Evid. Code section 1101(b).

21 Admissibility of other-crimes evidence depends on three principal factors: (1) the materiality  
22 of the fact sought to be proved or disproved; (2) the tendency of the uncharged crime to prove or  
23 disprove the material fact; and (3) the existence of any rule or policy requiring the exclusion of  
24 relevant evidence, e.g., Evidence Code section 352. *People v. Robbins* (1988) 45 Cal.3d 867, 879;  
25 Evid. Code section 210. The court's determination of these factors is reviewed on appeal for abuse  
26 of discretion, examining the evidence in the light most favorable to the court's ruling. *People v.*  
27 *Catlin* (2001) 26 Cal.4<sup>th</sup> 81, 120, citing *People v. Kipp* (1998) 18 Cal.4<sup>th</sup> 349, 370.

28 By pleading not guilty, the defendant puts in issue every element pertaining to the charged  
29 crimes. *People v. Ewoldt* (1994) 7 Cal.4<sup>th</sup> 380, 400, fn. 4; *People v. Balcom* (1994) 7 Cal.4<sup>th</sup> 414,  
30 422.

#### 31 32 2. The Defendants' Participation in both the Love and Pena murders Acts Demonstrate 33 Their Motive, Intent, Knowledge, Absence of Mistake or Accident, Lack of Self-Defense, 34 and Common Plan and Scheme.

35 The 1101(b) evidence is offered in this case to establish the defendant's intent, motive,  
36 knowledge, absence of mistake, not his identity. The required level of similarity when other



1 crimes are introduced to prove intent is slight, because it is the mental state when committing  
2 similar types of crimes, not the similarity of the facts of the crime, which is important:

3  
4 The least degree of similarity (between the uncharged act and the charged offense) is  
5 required in order to prove intent. [Citation omitted] **The recurrence of a similar result ...**  
6 **tends (increasingly with each instance) to negative accident or inadvertence or self-**  
7 **defense or good faith or other innocent mental state,** and tends to establish  
8 (provisionally, at least, though not certainly) the presence of the normal, i.e., criminal,  
9 intent accompanying such an act . . . [Citation omitted]. In order to be admissible to prove  
10 intent, the uncharged misconduct must be sufficiently similar to support the inference that  
11 the defendant probably harbored the same intent in each instance. *Ewoldt*, 7 Cal.4<sup>th</sup> at 402,  
12 citing, *People v. Robbins* (1988) 45 Cal.3d 867, 879 (emphasis added).  
13

14 In other words, the more it can be shown that a defendant harbored an intent to murder in  
15 other instances, the more clearly it demonstrates that a defendant harbored an intent to murder in  
16 the crime charged. This concept has been upheld repeatedly in murder cases by the California  
17 Supreme Court. A few of the court's rulings on this issue are discussed below as examples.

18 In *People v. Steele* (2002) 27 Cal.4<sup>th</sup> 1230, 1243, the defendant's previous murder was  
19 admitted to demonstrate the defendant's intent at the time of the killing for which he was on trial.  
20 In allowing the previous murder evidence, the *Steele* court repeated the oft-expressed logic of its  
21 earlier opinions permitting the introduction of additional murders to prove intent and  
22 premeditation:  
23

24 The doctrine of chances teaches that **the more one does something, the more likely that**  
25 **something was intended, and even premeditated, rather than accidental or**  
26 **spontaneous.** Specifically, the more one kills, especially under similar circumstances, the  
27 more reasonable the inference the killing was intended and premeditated. *Id.* at 1244  
28 (emphasis added).  
29

30 Similarly, in *People v. Robbins*, the California Supreme Court upheld a conviction in a  
31 sexual assault/murder case. To prove the defendant's lewd and murderous intent, the trial court  
32 permitted introduction of an uncharged rape and murder from Texas. In ruling the 1101(b)  
33 evidence was properly admitted, the *Robbins* court noted, "We have long recognized 'if a person  
34 acts similarly in similar situations, he probably harbors the same intent in each instance.'" *Robbins*,  
35 *supra*, 45 Cal.3d at 879, quoting *People v. Thompson* (1980) 27 Cal.3d 303, 319.  
36 //

1 In *People v. Padilla* (1995) 12 Cal.4<sup>th</sup> 825H, 923-925, a defendant was convicted of murder  
2 for hiring someone to kill his stepdaughter's friend. The murder was retaliation for the victim's  
3 theft of the defendant's drugs. The court upheld the trial court's ruling allowing 1101(b) evidence  
4 to show that a few weeks prior to the murder, the defendant shot his own stepdaughter in retaliation  
5 for her involvement in the same theft of his drugs. *Id.* The 1101(b) evidence was admitted to  
6 show the defendant's revenge motive in committing the crimes. *Id.* (Emphasis added.)

7 In *People v. Carpenter* (1997) 15 Cal.4<sup>th</sup> 312, 378-380, the defendant was charged with two  
8 counts of murder, one count of attempted murder, and one count each of rape and attempted rape  
9 arising from two separate incidents in Marin County. The trial court allowed introduction of  
10 three other murders and one previous rape the defendant had committed to prove the  
11 defendant's intent to kill and intent to rape in the instances for which the defendant was on trial.  
12 *Id.* at 378. The California Supreme Court upheld the introduction of the evidence for those  
13 purposes, noting the previously cited standards from *Ewoldt* and *Robbins*. *Id.* at 379. The court  
14 ruled the evidence was highly probative and admissible, and stated:

15  
16 A jury could reasonably infer from the evidence that defendant shot and killed three persons  
17 in 1980 that he intended to kill when he shot and killed two others, and shot but only  
18 wounded a third, several months later. Similarly, a jury could reasonably infer from the  
19 evidence that he raped one of the Marin County victims that he later intended to carry out  
20 his threat to rape [current victim]. There also is no rule or policy requiring exclusion.  
21 Evidence of uncharged crimes is inherently prejudicial but may still be admitted if it has  
22 substantial probative effect. [citation] The matter lies within the discretion of the trial  
23 court. *Id.* at 380.

- 24  
25 3. Motive Evidence is Admissible - The presence or absence of motive is a fact the jury  
26 may consider in determining whether or not the defendant committed the charged  
27 crimes. Evidence of motive is admissible to prove a defendant's guilt, and other crimes  
28 evidence has repeatedly been admitted to prove motive, as shown in the Carpenter case.  
29

30 Another example of the admission of motive evidence is *People v. Daly* (1992) 8  
31 Cal.App.4<sup>th</sup> 47, in which 1101(b) evidence was admitted to show a defendant's motive to kill a  
32 police officer. In that case, the defendant was a suspect in a robbery and kidnapping. A police  
33 officer asked him to come to the station to discuss the suspected crimes. When the defendant did  
34 not show up to be interviewed, police went out to find him. When they saw the defendant driving a  
35 car, they tried to stop him. The defendant fired at police and tried to get away, but was caught. *Id.*  
36 at 51-54.

1 The court ruled that evidence of the robbery and kidnapping would be admissible under  
2 section 1101(b) to show the defendant's motive when he fired at police - to avoid going to prison  
3 for the robbery and kidnapping - and hence his intent to commit murder. *Id.* at 55-56.

4 Another example is *People v. Barnett* (1998) 17 Cal.4<sup>th</sup> 1044, 1117-1121, in which the  
5 defendant was charged with murder after a gold dredging partnership went awry and ended in a  
6 gruesome murder. In the summer of 1985, the defendant and the victim were partners in a gold  
7 dredging operation at a remote campsite in Butte County. The two men and the victim's girlfriend  
8 were at the campsite when the partners had a falling out. The dispute culminated with the defendant  
9 punching the girlfriend in the face. Later that summer, the defendant vandalized the victim's Jeep at  
10 another remote campsite, forcing the victim to walk miles to civilization. The victim reported both  
11 crimes to the police. *Id.* at 1118-1121.

12 About a year later, the defendant returned to the campsite and tortured and murdered the  
13 victim. While beating the victim, the defendant kept calling him a snitch for calling police on him  
14 for assaulting the girl and vandalizing the Jeep. The victim's girlfriend testified at trial about the  
15 assault and another witness testified to the vandalism of the Jeep. The California Supreme Court  
16 upheld the introduction of the prior assault because "it offered considerable support for the  
17 prosecution's theory that defendant tortured and killed [the victim] for revenge." *Id.* at 1118. The  
18 Court also upheld the introduction of the vandalism for the same reason. *Id.* at 1120.

19 **Mental State Evidence is Admissible to Specifically to Negate Self-Defense**

20 The defendants may nonetheless attempt to defend the case on the basis of self-defense or a  
21 rash impulse. Where, a defendant tries to excuse his own violent conduct on the basis that he was  
22 defending himself, he puts into issue that aspect of his mental state at the time of the crime. *People*  
23 *v. Pertsoni* (1985) 172 Cal.App.3d 369, 373-374. Other acts of violence that tend logically to show  
24 the defendant's mind set at the time of the killing are therefore relevant and admissible evidence on  
25 that issue.

26 For instance, in *Pertsoni*, the defendant shot and killed a Yugoslav man. The prosecution  
27 theory was that the killing was premeditated and with malice aforethought. The defense contended  
28 that the killing was in self-defense. *Id.* To establish the defendant's motive for the crime, and to  
29 negate the self-defense claim, the prosecution was permitted to introduce evidence of a prior  
30 incident in which the defendant tried to shoot and kill two men leaving the Yugoslav consulate  
31 simply because he thought they were associated with the Yugoslav government. *Id.* at 372. The  
32 appellate court ruled that this evidence was "admissible because it tended logically and by  
33 reasonable inference to show that appellant's motive in shooting [the victim] was to kill an agent of  
34 the detested government, rather than to protect himself against a perceived danger." *Id.* at 374-375.

35 //

36 //

1 Another example comes from *Andrews v. City and County of San Francisco* (1988) 205  
2 Cal.App.3d 938. In that case, Harry Andrews was arrested by San Francisco Police officers.  
3 During the booking process, Mr. Andrews was involved in a physical altercation with Officer  
4 Ramirez, with Mr. Andrews suffering significant injuries. In a subsequent civil suit for damages,  
5 Mr. Andrews contended the altercation was an unprovoked attack by Officer Ramirez. Officer  
6 Ramirez argued that the incident was caused by Mr. Andrews' unruliness and that any injuries  
7 were suffered accidentally while Officer Ramirez was defending himself. Mr. Andrews sought to  
8 introduce evidence of the officer's prior acts of unprovoked violence toward inmates being booked.  
9 Although the trial court refused to allow such evidence, the court of appeal reversed the ruling.

10 The *Andrews* court noted that "Ramirez' intent was a central issue in the case. He  
11 professed that he was merely attempting to control plaintiff by use of reasonable force under the  
12 circumstances, whereas plaintiff contended that Ramirez not only provoked the confrontation, but  
13 intentionally injured him." *Id.* at 945. In holding that the evidence should have been admitted, the  
14 court stated:

15  
16 Evidence that Ramirez had a practice of bullying and assaulting other persons under his  
17 custody without provocation or apparent reason would tend to show that the injuries suffered  
18 by plaintiff were not the product of efforts to control him, but were inflicted intentionally and  
19 with malice. *Id.*

20  
21 In the case at bar, the People contend that when the defendant killed Rafael Noriega he was  
22 motivated by the desire to rob and kill him. The defense may well assert that the killing was  
23 motivated by a belief in the need to protect himself. By casting himself in the role of victim, the  
24 defendant makes even more probative his other acts involving homicidal violence, which tend to  
25 show that his motive and intent was not to protect himself, but to harm the victim to avoid  
26 incarceration and for personal gain.

27  
28 **4. Evidence Code Section 352 Does Not Bar the Proposed Evidence in a Murder Case.**

29 Of course, no analysis of 1101(b) evidence would be complete without analysis in light of  
30 Evidence Code section 352. Under that section:

31  
32 The court may in its discretion exclude evidence if its **probative value is substantially**  
33 **outweighed** by the probability that its admission will (a) necessitate an undue consumption  
34 of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of  
35 misleading the jury. (E.C. section 352, emphasis added.)  
36

1  
2 In this case, the probative value of the proposed evidence greatly outweighs any potential  
3 prejudice to the defendant. First, courts have held that as the importance of the issue to be proven  
4 increases, so increases the probative value of the prior conviction that proves the issue. *People v.*  
5 *Denis* (1990) 224 Cal.App.3d 563 *rev denied*. There, the Court of Appeals upheld the admission of  
6 prior robberies to prove defendant's intent to rob in the case at issue. In weighing probative value  
7 against prejudicial effect, the Court stressed that defendant's intent was the main issue in the case  
8 and that therefore the evidence had strong probative value.

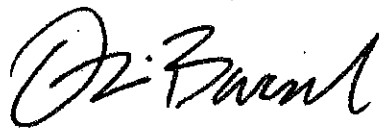
9 In this case, the crucial issue will be the defendants state of mind at the time of the killings is  
10 a crucial issue. Further motive, absence of mistake, lack of self-defense, and a common plan or  
11 scheme are all key issues. The probative value of the 1101(b) evidence is therefore greatly  
12 enhanced.

13 As demonstrated by the various murder cases cited above, including *Steele*, *Robbins*, *Padilla*,  
14 and *Carpenter*, introducing evidence of a capital defendant's additional murders does not run afoul  
15 of Evidence Code section 352, despite the seriousness of the other crimes evidence and the high  
16 stakes of a murder trial.

17  
18 Dated: September 10, 2007  
19

20 Respectfully submitted,  
21

22 ROD PACHECO  
23 District Attorney  
24

25   
26

27 QUINN R. BARANSKI  
28 Deputy District Attorney  
29

30 QRB:sam  
31 Damion  
32  
33  
34  
35  
36

1 AMADOR L. CORONA (SBN 93679)  
Attorney at Law  
2 121 E. Fourth Street, Suite C  
Corona, CA 92879-1406  
3 (951) 279-1009

4 Attorney for Defendant  
SHAWN M. KHALIFA  
5  
6

5/19  
S204  
FILED  
SUPERIOR COURT OF CALIFORNIA  
COUNTY OF RIVERSIDE

MAY 01 2006  
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MAY 02 2006  
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7 SUPERIOR COURT OF THE STATE OF CALIFORNIA  
8 COUNTY OF RIVERSIDE  
9

10 PEOPLE OF THE STATE OF  
CALIFORNIA

11 Plaintiff,

12 -vs-

13 FERNANDO GIL RIVERA,  
SHAWN MALONE KHALIFA,  
14 MARK ANTHONY GARDNER, JR.,

15 Defendants.

CASE NO. SWF 006720

NOTICE OF MOTION TO  
SUPPRESS CONFESSION AND OR  
ADMISSIONS OF SHAWN KHALIFA:  
DECLARATION OF AMADOR L.  
CORONA: POINTS AND  
AUTHORITIES IN SUPPORT

Date: 5-19-06  
Time: 8:30 A.M.  
Dept: S-204

17 TO: DISTRICT ATTORNEY FOR THE COUNTY OF RIVERSIDE AND /OR HIS  
18 REPRESENTATIVES:

19 PLEASE TAKE NOTICE that on May 19, 2006 at 8:30 A.M. in  
20 Department S-204 of the above-entitled court, located at  
21 30755-D Auld Rd., Murrieta Defendant SHAWN MALONE KHALIFA will  
22 move the court for an order suppressing all evidence of the defendant's alleged confession  
23 and or admissions to the charges in the above entitled action.


24 Said Motion will be based on the grounds that the introduction of such evidence  
25 before the trier of fact would violate the defendant's right to counsel, his rights against  
26 compulsory self incrimination, and his right to due process of law as guaranteed by the  
27

1 Fourth, Fifth, Sixth and Fourteenth Amendments to the United States constitution and Article  
2 I, Section 13 of the California Constitution.

3 Said motion will be made and based on this Notice, pleadings, all papers, documents  
4 and records in this case and on file herein, declaration of Amador L. Corona and the Points  
5 and Authorities attached hereto, and such oral and further evidence, either oral or written,  
6 as might be adduced at the time of said hearing.

7 Respectfully submitted,

8  
9  
10 DATED: 4-11-06

  
AMADOR L. CORONA  
Attorney for Defendant  
Shawn Malone Khalifa

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Respectfully submitted,

DATED: 4-11-06

  
AMADOR L. CORONA  
Attorney for Defendant  
Shawn Khalifa

**DECLARATION OF AMADOR L. CORONA**

I, Amador L. Corona declare as follows:

1. I am counsel for the defendant SHAWN K HALIFA..

2. I have carefully reviewed the taped interrogation of Shawn Khalifa.

3. The initial part of the interrogation is conducted by detective Spivacke. Shawn answers some questions about how he knows the decedent Juan Pena . Shawn denies having any knowledge about the death of the old man (i.e Hubert Love) in spite of prodding by detective Spivacke. Shawn is so uncooperative and reluctant to answer questions that detective Spivacke tells him "You're killing me over here. Why do you want to be like this?".

4. Shawn responds; "I don't know. I just want to be quiet, use my rights. I just want to be quiet." Spivacke asks; "You want to use your rights?" and Shawn responds "Yeah".

5. Detective Cook then intercedes and asks Shawn "Do you want to talk to me?". Shawn responds; "Yeah, whats up."

6. Shawn then proceeds to answer numerous questions about his whereabouts and activities leading up to the day that Hubert Love and Juan Pena were killed. He continues to deny any involvement or knowledge of the killings. Detective Cook shows Shawn a photo of the corpse of Juan Pena. Shawn appears to cry.

Shawn then states; "I don't want to talk anymore".


Detective Cook says; "You don't want to talk at all".

Shawn does not answer.

Detective Cook then continues with the interrogation.

7. Much later into the interrogation Shawn makes some incriminating admissions.

I declare under penalty of perjury that the foregoing is true and correct. Executed on April 11, 2006 in Corona, California.

  
AMADOR L. CORONA  
Declarant

1 **PROOF OF SERVICE**

2  
3 STATE OF CALIFORNIA )  
4 COUNTY OF RIVERSIDE)

5 I am employed in the County of Riverside, State of California. I am over the age of  
6 18 and not a party to the within action. My business address is 121 E. Fourth Street, Suite  
C, Corona, CA 92879-1406.

7 On May 1, 2006, I served the foregoing document described as:

8 **NOTICE OF MOTION TO SUPPRESS CONFESSION AND OR**  
9 **ADMISSIONS OF SHAWN KHALIFA; DECLARATION OF**  
**AMADOR L. CORONA; POINTS AND AUTHORITIES IN SUPPORT**

10 \_\_\_\_\_ By Delivering or causing a true copy to be delivered to the ( ) offices of the  
11 addressee(s); and/or ( ) the addressee personally:  
12  
13

14 **AND**

15   X   By placing ( ) the original (X) a true copy of the original enclosed in a sealed  
16 envelope addressed as follows:

17 ATTN: BOB OLSON, Deputy District Attorney  
18 Riverside County District Attorney  
4075 Main Street  
19 Riverside, CA 92501

20 I declare under penalty of perjury under the laws of the State of California that the  
21 above is true and correct.

22 Executed this   1st   day of   May  , 2006 at Corona, California.

23   
24 Maricela Gamino-Goode  
25  
26  
27

28 PROOF.KHALIFA.WPD

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CASE NUMBER: SWF006720  
ARREST NBR : PER04029054  
ARREST AGY : Riv SHERIFF @ PERRIS  
Defendant .: RIVERA, FERNANDO GIL

DEFENDANT STATUS: Closed  
ARREST DATE . . . : 1/31/04

Defn : 1 of 3

Courtroom Assistant: W. Rogers  
Court Reporter: D. Paddock  
People represented by Deputy District Attorney:  
Q. Baranski.  
Defendant represented by PVT-D. Greenberg.  
Defendant Present.  
At 9:37 the following proceedings were held:  
Court and Counsel Confer regarding: Jury  
Instructions.  
At 9:41 the following proceedings were held:  
All parties Present in Court.  
Members of the Jury and Alternate(s) are present  
People's witness Joseph I. Cohen, previously  
sworn, resumes the witness stand.  
People's Exhibit 63 (Photo: Love Autopsy-Interior  
Cranium Bruises) is/are Marked for  
identification only.  
At 10:30 the following proceedings were held:  
Co-defendant's jury (KHALIFA-JURY #1) not present  
in Court.  
People's witness Joseph I. Cohen, previously  
sworn, resumes the witness stand.  
People's Exhibit 160 (Photograph: Pena Autopsy  
with Dr. Cohen) is/are Marked for identification  
only.  
People's Exhibit 75 (Photograph: Pena  
Autopsy-Full Frontal) is/are Marked for  
identification only.  
People's Exhibit 76 (Photograph: Pena  
Autopsy-Face) is/are Marked for identification  
only.  
People's Exhibit 88 (Photograph: Pena  
Autopsy-Right Shoulder) is/are Marked for  
identification only.  
People's Exhibit 89 (Photograph: Pena  
Autopsy-Left Shoulder) is/are Marked for  
identification only.  
People's Exhibit 90 (Photo: Pena Autopsy-Left  
Shoulder Near View) is/are Marked for  
identification only.  
People's Exhibit 80 (Photograph: Pena  
Autopsy-Left Ear) is/are Marked for  
identification only.  
People's Exhibit 82 (Photograph: Pena  
Autopsy-Left Face and Head) is/are Marked for  
identification only.  
People's Exhibit 83 (Photograph: Pena Autopsy-Head

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CASE NUMBER: SWF006720 DEFENDANT STATUS: Closed  
ARREST NBR : PER04029054 ARREST DATE ....: 1/31/04  
ARREST AGY : Riv SHERIFF @ PERRIS  
Defendant .: RIVERA, FERNANDO GIL Defn : 1 of 3  
=====

to Left Shoulder) is/are Marked for  
identification only.  
People's Exhibit 85 (Photograph: Pena Autopsy-Rod  
Side View) is/are Marked for identification only.  
At 10:53 a.m. Jurors are directed to return at  
11:05 a.m.  
Court in recess until 11:05 a.m.  
At 11:13 the following proceedings were held:  
All parties Present in Court.  
Members of the Jury and Alternate(s) are present  
Co-defendant's jury (KHALIFA-JURY #1) not present  
in Court.  
People's witness Joseph I. Cohen, previously  
sworn, resumes the witness stand.  
People's Exhibit 84 (Photograph: Pena  
Autopsy-Facial with Rod) is/are Marked for  
identification only.  
People's Exhibit 77 (Photograph: Pena  
Autopsy-Mouth) is/are Marked for identification  
only.  
People's Exhibit 91 (Photograph: Pena  
Autopsy-Head X-Ray) is/are Marked for  
identification only.  
People's Exhibit 81 (Photograph: Pena  
Autopsy-Rear Left Head) is/are Marked for  
identification only.  
People's Exhibit 78 (Photograph: Pena  
Autopsy-Right Cheek) is/are Marked for  
identification only.  
People's Exhibit 79 (Photograph: Pena  
Autopsy-Face and Torso) is/are Marked for  
identification only.  
People's Exhibit 87 (Photograph: Pena  
Autopsy-Back) is/are Marked for identification  
only.  
People's Exhibit 93 (Photograph: Pena  
Autopsy-Lower Left Back) is/are Marked for  
identification only.  
People's Exhibit 92 (Photograph: Pena  
Autopsy-Right Hip) is/are Marked for  
identification only.  
People's Exhibit 159 (Photograph: Pena  
Autopsy-Left Hand) is/are Marked for  
identification only.  
People's Exhibit 99 (Photograph: Pena  
Autopsy-Right Hand) is/are Marked for  
identification only.

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CASE NUMBER:	SWF006720	DEFENDANT STATUS:	Closed
ARREST NBR :	PER04029054	ARREST DATE ....:	1/31/04
ARREST AGY :	Riv SHERIFF @ PERRIS		
Defendant .:	RIVERA, FERNANDO GIL	Defn :	1 of 3

=====

recall.

At 3:00 p.m. Jurors are admonished and directed to return at 3:15 p.m.

Court in recess until 3:15 p.m.

At 3:20 the following proceedings were held:

All parties Present in Court.

Members of the Jury and Alternate(s) are present  
People's witness Joseph I. Cohen, is sworn and testifies.

People's Exhibit 60 (Photograph: Love Autopsy-Left Eye) is/are Marked for identification only.

People's Exhibit 61 (Photograph: Love Autopsy-Forehead) is/are Marked for identification only.

People's Exhibit 62 (Photograph: Love Autopsy-Right Forehead) is/are Marked for identification only.

People's Exhibit 49 (Photograph: Love Autopsy-Torso and Neck) is/are Marked for identification only.

People's Exhibit 64 (Photograph: Love Autopsy-Hyoid Bone) is/are Marked for identification only.

People's Exhibit 50 (Photograph: Love Autopsy-Torso Bruises) is/are Marked for identification only.

People's Exhibit 55 (Photograph: Love Autopsy-Left Wrist) is/are Marked for identification only.

People's Exhibit 56 (Photograph: Love Autopsy-Right Elbow) is/are Marked for identification only.

People's Exhibit 54 (Photograph: Love Autopsy-Left Elbow) is/are Marked for identification only.

People's Exhibit 53 (Photograph: Love Autopsy-Right Knee) is/are Marked for identification only.

People's Exhibit 52 (Photograph: Love Autopsy-Right Hand) is/are Marked for identification only.

People's Exhibit 51 (Photograph: Love Autopsy-Left Hand) is/are Marked for identification only.

People's Exhibit 57 (Photograph: Love Autopsy-Elbow with Spots) is/are Marked for

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CASE NUMBER: SWF006720 DEFENDANT STATUS: Closed  
ARREST NBR : PER04029054 ARREST DATE ....: 1/31/04  
ARREST AGY : Riv SHERIFF @ PERRIS  
Defendant .: RIVERA, FERNANDO GIL Defn : 1 of 3  
=====

People's witness Robert Spivacke, previously sworn, resumes the witness stand. Videotape (People's Exhibit 3A) continues to be played to the Jury. At 4:13 the following proceedings were held: Jurors are admonished and directed to return on 10/09/2007 at 9:30. Witness Robert Spivacke is ordered to return at 9:30 a.m. on 10/09/07. Court and Counsel Confer regarding: schedule. Clerk to contact co-defendant's Jury (KHALIFA-JURY #1) to return at 10:30 a.m. on 10/09/07. Jury Trial (In-Progress) adjourned to 10/09/2007 at 9:15 Dept S304 Defendant ordered to return on any and all future hearing dates. Remains remanded to custody of Riverside Sheriff. Bail to Remain as fixed. Defendant to be dressed out for trial. Minute Order printed to Southwest Detention Center  
MINUTE ORDER OF COURT PROCEEDING  
-----

HOUSING LOCATION: SWDC  
-----

10/03/07 S304 Jury Trial In-Progress Dispo  
9TH Day of Trial  
Honorable Judge Judith C Clark, Presiding  
Courtroom Assistant: W. Rogers  
Court Reporter: D. Paddock  
People represented by Deputy District Attorney:  
Q. Baranski.  
Defendant represented by PVT-D. Greenberg.  
Defendant Present.  
At 9:53 the following proceedings were held:  
All parties Present in Court.  
Members of the Jury and Alternate(s) are present  
People's witness Brett Seckinger, previously sworn, resumes the witness stand.  
People's Exhibit 136 (Photograph: Pena Dump-Marker #1) is/are Marked for identification only.  
People's Exhibit 137 (Photograph: Pena Dump Marker #F) is/are Marked for identification only.  
People's Exhibit 148 (Photo: Pena Dump-2nd Photostat Shoe Impression) is/are Marked for identification only.



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CASE NUMBER: SWF006720 DEFENDANT STATUS: Closed  
ARREST NBR : PER04029054 ARREST DATE ....: 1/31/04  
ARREST AGY : Riv SHERIFF @ PERRIS  
Defendant .: RIVERA, FERNANDO GIL Defn : 1 of 3

People's Exhibit 147 (Photo: Pena Dump-1st Photostat Shoe Impression) is/are Marked for identification only.  
People's Exhibit 149 (Photo-Pena Dump-3rd Photostat Shoe Impression) is/are Marked for identification only.  
People's Exhibit 150 (Photograph-Fry's Electronics) is/are Marked for identification only.  
People's Exhibit 138 (Photograph: Pena Dump-Marker #C) is/are Marked for identification only.  
People's Exhibit 139 (Photograph: Pena Dump-Marker #D) is/are Marked for identification only.  
People's Exhibit 140 (Photograph: Pena Dump-Marker #E) is/are Marked for identification only.  
People's Exhibit 141 (Photograph: Pena Dump-Marker #G) is/are Marked for identification only.  
People's Exhibit 142 (Photograph: Pena Dump-Marker #H) is/are Marked for identification only.  
People's Exhibit 143 (Photograph: Pena Dump-Marker #F) is/are Marked for identification only.  
People's Exhibit 144 (Photograph: Pena Dump-Marker #M) is/are Marked for identification only.  
People's Exhibit 154 (Photograph: Love's Car Tire) is/are Marked for identification only.  
People's Exhibit 67 (Photograph: Pena Dump-West View) is/are Marked for identification only.  
At 10:30 the following proceedings were held:  
Co-defendant's jury (KHALIFA-JURY #1) not present in Court.  
People's witness Brett Seckinger, previously sworn, resumes the witness stand.  
People's Exhibit 66 (Photograph: Pena Dump-Body East View) is/are Marked for identification only.  
People's Exhibit 65 (Photograph: Pena Dump-Body) is/are Marked for identification only.  
People's Exhibit 146 (Photograph: Pena Dump-Body Near View) is/are Marked for identification only.  
People's Exhibit 145 (Photograph: Pena Dump-Body Far View) is/are Marked for identification only.

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CASE NUMBER: SWF006720 DEFENDANT STATUS: Closed  
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ARREST AGY : Riv SHERIFF @ PERRIS  
Defendant .: RIVERA, FERNANDO GIL Defn : 1 of 3  
=====

Witness Brett Seckinger is excused, subject to recall.

At 10:39 Court in recess.

Jurors to take break and wait outside courtroom.

At 10:54 the following proceedings were held:

All parties Present in Court.

Members of the Jury and Alternate(s) are present

People's witness Adrian Mejia, is sworn and testifies.

Witness Adrian Mejia is excused.

People's witness David Josker, is sworn and testifies.

People's Exhibit 20 (Photograph: Love Home Exterior-Back Windows) is/are Marked for identification only.

People's Exhibit 22 (Photo: Love Home Exterior-Sliding Glass Door) is/are Marked for identification only.

People's Exhibit 28 (Photo: Love Home Interior-Back Door Entry) is/are Marked for identification only.

People's Exhibit 29 (Photo: Love Home Interior-Footprints to Door) is/are Marked for identification only.

People's Exhibit 31 (Photo: Love Home Interior-Footprints and Body) is/are Marked for identification only.

People's Exhibit 34 (Photo: Love Home Interior-Body Toward Door) is/are Marked for identification only.

People's Exhibit 38 (Photo-Love Home Int-Footprints to Fireplace) is/are Marked for identification only.

People's Exhibit 39 (Photograph: Love Home Interior-Balcony) is/are Marked for identification only.

People's Exhibit 25 (Photo: Love Home Interior-Kitchen Back View) is/are Marked for identification only.

People's Exhibit 26 (Photograph: Love Home Interior-Dining Room) is/are Marked for identification only.

People's Exhibit 27 (Photograph: Love Home Interior-Living Room) is/are Marked for identification only.

People's Exhibit 12 (Diagram #4 of Love's Residence Floor Plan) is/are Marked for

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CASE NUMBER: SWF006720 DEFENDANT STATUS: Closed  
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ARREST AGY : Riv SHERIFF @ PERRIS  
Defendant .: RIVERA, FERNANDO GIL Defn : 1 of 3

identification only.  
People's Exhibit 12A (Micro Diagram Love's Residence Floor Plan) is/are Marked for identification only.  
People's Exhibit 21 (Photo: Love Home Exterior-Back Yard West View) is/are Marked for identification only.  
People's Exhibit 59 (Photograph: Love Autopsy-At Scene Facial) is/are Marked for identification only.  
At 12:00 the following proceedings were held:  
Jurors are admonished and directed to return at 1:30 p.m.  
Court in recess until 1:30 p.m.  
At 1:42 the following proceedings were held:  
All parties Present in Court.  
Members of the Jury and Alternate(s) are present  
People's witness David Josker, previously sworn, resumes the witness stand.  
People's Exhibit 33 (Photo- Love Home Interior-Body from Stairs) is/are Marked for identification only.  
People's Exhibit 35 (Photograph: Love Home Interior-#14) is/are Marked for identification only.  
People's Exhibit 37 (Photograph: Love Home Interior-#18) is/are Marked for identification only.  
Witness David Josker is excused, subject to recall.  
People's witness Michael Lujan, is sworn and testifies.  
People's Exhibit 23 (Photo: Love Home Exterior-Sliding Glass Door) is/are Marked for identification only.  
At 2:40 p.m. Jurors are admonished and directed to return at 2:55 p.m.  
Court in recess until 2:55 p.m.  
At 2:58 the following proceedings were held:  
Out of the Presence Of the Jury, the following proceedings were held: -  
Court and Counsel Confer regarding statement made to a family member of victim Love by a Juror from Jury #2 (Rivera's Jury).  
Family Member S. Love Present in Court.  
Court inquires with family member regarding statement.

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CASE NUMBER: SWF006720 DEFENDANT STATUS: Closed  
ARREST NBR : PER04029054 ARREST DATE ....: 1/31/04  
ARREST AGY : Riv SHERIFF @ PERRIS  
Defendant .: RIVERA, FERNANDO GIL Defn : 1 of 3  
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At 3:02 the following proceedings were held:  
Alternate Juror #2 from Jury #2 (Rivera's Jury)  
Present in Court.  
Court inquires with Alternate Juror #2 regarding  
statement.  
Alternate Juror to wait outside courtroom.  
The Court will allow Alternate Juror #2 to remain  
on the Jury.  
At 3:08 the following proceedings were held:  
All parties Present in Court.  
Members of the Jury and Alternate(s) are present  
People's witness Michael Lujan, previously sworn,  
resumes the witness stand.  
Witness Michael Lujan is excused, subject to  
recall.  
At 3:44 the following proceedings were held:  
Jurors are admonished and directed to return on  
10/04/2007 at 9:30.  
Jury Trial (In-Progress) adjourned to 10/04/2007  
at 9:15 Dept S304  
Defendant ordered to return on any and all future  
hearing dates.  
Remains remanded to custody of Riverside Sheriff.  
Bail to Remain as fixed.  
Defendant to be dressed out for trial.  
Minute Order printed to Southwest Detention Center  
MINUTE ORDER OF COURT PROCEEDING  
-----

HOUSING LOCATION: SWDC  
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10/02/07 S304 Jury Trial In-Progress Dispo  
8TH Day of Trial  
Honorable Judge Judith C Clark, Presiding  
Courtroom Assistant: W. Rogers  
Court Reporter: D. Wagner  
People represented by Deputy District Attorney:  
Q. Baranski.  
Defendant represented by PVT-D. Greenberg.  
Defendant Present.  
At 9:54 the following proceedings were held:  
Members of the Jury and Alternate(s) are present  
People's witness Arturo Hernandez, is sworn and  
testifies.  
People's Exhibit 43 (Aerial Photograph: Haz-it  
Market) is/are Marked for identification only.  
People's Exhibit 44 (Aerial Photograph: Pena Body  
Dump) is/are Marked for identification only.

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CASE NUMBER: SWF006720 DEFENDANT STATUS: Closed  
ARREST NBR : PER04029054 ARREST DATE ....: 1/31/04  
ARREST AGY : Riv SHERIFF @ PERRIS  
Defendant .: RIVERA, FERNANDO GIL Defn : 1 of 3  
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People's Exhibit 71 (Photograph: Pena Dump-North View) is/are Marked for identification only.  
People's Exhibit 119 (Photograph: Car-Exterior Passenger Side) is/are Marked for identification only.  
People's Exhibit 10A (Micro Diagram of Juan Pena body dump) is/are Marked for identification only.  
Witness Arturo Hernandez is excused.  
People's witness Brett Seckinger, is sworn and testifies.  
People's Exhibit 10 (Diagram #2 of Juan Pena body dump) is/are Marked for identification only.  
People's Exhibit 72 (Photograph: Pena Dump-East View) is/are Marked for identification only.  
People's Exhibit 68 (Photograph: Pena Dump-Scene Markings) is/are Marked for identification only.  
At 10:51 a.m. Jurors are admonished and directed to return at 11:05 a.m.  
Court in recess until 11:05 a.m.  
Out of the Presence Of the Jury, the following proceedings were held: at 11:08 a.m.  
Court and Counsel Confer regarding: photographs of victim Love.  
At 11:11 the following proceedings were held:  
All parties Present in Court.  
Members of the Jury and Alternate(s) are present  
People's witness Brett Seckinger, previously sworn, resumes the witness stand.  
People's Exhibit 69 (Photograph: Pena Dump-Shoe Print #1) is/are Marked for identification only.  
People's Exhibit 70 (Photograph: Pena Dump-Shoe Print #2) is/are Marked for identification only.  
People's Exhibit 124 (.380 casing) is/are Marked for identification only.  
People's Exhibit 123 (Pena's wallet) is/are Marked for identification only.  
People's Exhibit 11A (Micro Diagram of Love's Honda Accord) is/are Marked for identification only.  
People's Exhibit 11 (Diagram #3 of Love's Honda Accord) is/are Marked for identification only.  
People's Exhibit 101 (Photograph: Car Recovery-Aerial) is/are Marked for identification only.  
People's Exhibit 105 (Photograph: Car Recovery-Dirt Road) is/are Marked for identification only.

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CASE NUMBER: SWF006720 DEFENDANT STATUS: Closed  
ARREST NBR : PER04029054 ARREST DATE ....: 1/31/04  
ARREST AGY : Riv SHERIFF @ PERRIS  
Defendant .: RIVERA, FERNANDO GIL Defn : 1 of 3  
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People's Exhibit 103 (Photograph: Car Recovery-Driver's Side) is/are Marked for identification only.  
People's Exhibit 104 (Photograph: Car Recovery-Numbers) is/are Marked for identification only.  
People's Exhibit 128 (Bloody Paper Napkin) is/are Marked for identification only.  
At 11:59 a.m. Jurors are admonished and directed to return at 1:45 p.m.  
Witness ordered to return at 1:45 p.m.  
Court in recess until 1:30 p.m.  
At 1:39 the following proceedings were held:  
Motion by Defense Re exclude photos regarding victim Love is called for hearing.  
Argument presented by both sides.  
Motion denied.  
Court and Counsel Confer regarding: People's witness.  
Counsel stipulate: People may call witness prior to resuming with witness Seckinger.  
At 1:59 the following proceedings were held:  
All parties Present in Court.  
Members of the Jury and Alternate(s) are present  
People's witness Araceli Farias, is sworn and testifies.  
Interpreter Al Castillo is Present and Sworn to interpret Spanish/English for witness. Sworn oath on file.  
Witness Araceli Farias is excused.  
People's witness Brett Seckinger, previously sworn, resumes the witness stand.  
People's Exhibit 102 (Photograph: Car Recovery-Front) is/are Marked for identification only.  
People's Exhibit 131 (Photograph: Car-Broken Passenger Window) is/are Marked for identification only.  
People's Exhibit 108 (Photograph: Car-Interior Front Passenger Door) is/are Marked for identification only.  
People's Exhibit 109 (Photograph: Car-Front Passenger Floor) is/are Marked for identification only.  
People's Exhibit 110 (Photograph: Car-Driver's Seat) is/are Marked for identification only.  
People's Exhibit 111 (Photograph: Car-Napkins)

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Defendant .: RIVERA, FERNANDO GIL Defn : 1 of 3  
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is/are Marked for identification only.  
People's Exhibit 112 (Photograph: Car-Driver's  
Seat Stain) is/are Marked for identification  
only.  
People's Exhibit 113 (Photograph: Car-#12) is/are  
Marked for identification only.  
People's Exhibit 115 (Photograph: Car-#7) is/are  
Marked for identification only.  
People's Exhibit 117 (Photograph: Car-Bullet  
Fragment) is/are Marked for identification only.  
People's Exhibit 118 (Photograph: Car-#13) is/are  
Marked for identification only.  
People's Exhibit 107 (Photograph: Car-Front  
Windshield) is/are Marked for identification  
only.  
At 3:00 p.m. Jurors are admonished and directed  
to return at 3:15 p.m.  
Court in recess for 15 minutes.  
At 3:23 the following proceedings were held:  
All parties Present in Court.  
Members of the Jury and Alternate(s) are present  
People's witness Brett Seckinger, previously  
sworn, resumes the witness stand.  
People's Exhibit 125 (Grey bullet) is/are Marked  
for identification only.  
People's Exhibit 126 (Foil Wrapped Candy #1)  
is/are Marked for identification only.  
People's Exhibit 127 (Foil Wrapped Candy #2)  
is/are Marked for identification only.  
At 4:11 the following proceedings were held:  
Jurors are admonished and directed to return on  
10/03/2007 at 9:30.  
Witness Brett Seckinger is ordered to return at  
9:30 a.m. on 10/03/07.  
Jury Trial (In-Progress) adjourned to 10/03/2007  
at 9:15 Dept S304  
Defendant ordered to return on any and all future  
hearing dates.  
Remains remanded to custody of Riverside Sheriff.  
Bail to Remain as fixed.  
Defendant to be dressed out for trial.  
Minute Order printed to Southwest Detention Center  
MINUTE ORDER OF COURT PROCEEDING

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HOUSING LOCATION: SWDC  
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10/01/07 S304 Jury Trial In-Progress

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ARREST NBR : PER04029054 ARREST DATE ....: 1/31/04  
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Defendant .: RIVERA, FERNANDO GIL Defn : 1 of 3

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6TH Day of Trial

Honorable Judge Judith C Clark, Presiding

Courtroom Assistant: W. Rogers

Court Reporter: K. Ernst

People represented by Deputy District Attorney:

Q. Baranski.

Defendant represented by PVT-D. Greenberg.

Defendant Present.

At 9:35 the following proceedings were held:

Court and Counsel Confer regarding: scheduling

and testimony of witness.

CDL-J. Zimel for witness-Mark Gardner Present in Court.

People's witness Mark Gardner Present in Court.

Court admonishes witness re: testimony.

At 9:46 the following proceedings were held:

Members of the Jury and Alternate(s) are present

People's witness Mark Gardner, previously sworn, resumes the witness stand.

People's Exhibit 14 (Photograph: Love Home

Exterior-Front Door) is/are Marked for identification only.

People's Exhibit 30 (Photo:Love Home

Int-Footprints to Fireplace) is/are Marked for identification only.

People's Exhibit 32 (Photo:Love Home

Interior-Body High View) is/are Marked for identification only.

People's Exhibit 132 (11/08/06 Gardner Intital Meeting Agreement) is/are Marked for identification only.

People's Exhibit 134 (Gardner Felony Plea Form) is/are Marked for identification only.

People's Exhibit 133 (09/17/07 Gardner Plea

Contract) is/are Marked for identification only.

At 10:48 a.m. Jurors are admonished and directed to return at 11:05 a.m.

Court in recess for 15 minutes.

At 11:08 the following proceedings were held:

All parties Present in Court.

Members of the Jury and Alternate(s) are present

People's witness Mark Gardner, previously sworn, resumes the witness stand.

People's Exhibit 6A (Transcript-02/01/04 Mark Gardner Interview) is/are Marked for

identification only.

At 11:59 a.m. Jurors are admonished and directed



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ARREST NBR : PER04029054 ARREST DATE ....: 1/31/04  
ARREST AGY : Riv SHERIFF @ PERRIS  
Defendant .: RIVERA, FERNANDO GIL Defn : 1 of 3  
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surround Love Resid) is/are Marked for  
identification only.  
People's Exhibit 13 (Photograph: Love Home  
Exterior-Front View) is/are Marked for  
identification only.  
At 3:10 All Jurors Are Directed to return at 3:25  
p.m.  
Court in recess for 15 minutes.  
At 3:29 the following proceedings were held:  
All parties Present in Court.  
Members of the Jury and Alternate(s) are present  
People's witness Mark Gardner, previously sworn,  
resumes the witness stand.  
People's Exhibit 15 (Photograph: Love Home  
Exterior-Front Angle) is/are Marked for  
identification only.  
People's Exhibit 16 (Photograph: Love Home  
Exterior-Side Gate) is/are Marked for  
identification only.  
People's Exhibit 18 (Photo: Love Home  
Exterior-Side Yard North View) is/are Marked for  
identification only.  
People's Exhibit 17 (Photograph: Love Home  
Exterior-Side Yard) is/are Marked for  
identification only.  
People's Exhibit 19 (Photograph: Love Home  
Exterior-Back Yard) is/are Marked for  
identification only.  
People's Exhibit 120 (Photograph: Car-Rear End)  
is/are Marked for identification only.  
People's Exhibit 9A (Micro Diagram of  
neighborhood Love residence) is/are Marked for  
identification only.  
People's Exhibit 116 (Photograph: Car-Driver's  
Back Side) is/are Marked for identification only.  
At 4:10 the following proceedings were held:  
Jurors are admonished and directed to return on  
09/27/2007 at 9:30.  
Out of the Presence Of the Jury, the following  
proceedings were held: -  
Witness MARK GARDNER (Incustody) ordered to  
return on 09/27/2007 at 9:30 in Dept S304.  
Witness to be dressed out for trial.  
Defendant waives time for Sentencing as to Count 1  
plus 20 court days from conclusion of this trial.  
Jury Trial (In-Progress) adjourned to 09/27/2007  
at 9:15 Dept S304